92

Supreme Court, U.S.
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In The

Supreme Court of the United States

MICHAEL A. ROSIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

JOEL HIRSCHHORN*
BRIAN H. BIEBER
Attorneys for Petitioner

HIRSCHHORN & BIEBER, P.A.
550 Biltmore Way
Penthouse Three A
Coral Gables, FL 33134
Telephone: (305) 445-5320
Telecopier: (305) 446-1766

**Counsel of Record*

QUESTIONS PRESENTED

1. Whether the Eleventh Circuit decided an important Federal question in a way which conflicts with relevant decisions of this Court and violates Petitioner's Sixth and Eighth Amendment rights when it affirmed Petitioner's 264-month sentence based on the now advisory Federal Sentencing Guidelines?

2. Whether the Eleventh Circuit unlawfully sanctioned the Prosecutor's unduly prejudicial and inflammatory misconduct which deprived Petitioner of a fair and impartial trial as guaranteed by the Fifth and Sixth Amendments to the United States Constitution?

3. Whether the Eleventh Circuit has decided an important Federal question in a way which conflicts with a relevant decision of the Fourth Circuit when it unlawfully sanctioned the denial of Petitioner's 18 U.S.C. § 4241(a) and related Competency Motions thus denying Petitioner's Fifth Amendment right to Due Process of Law?

PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iii
INDEX TO APPENDIX	iv
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE PETITION	9
I. THE ELEVENTH CIRCUIT DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY WHICH CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT AND VIOLATES PETITIONER'S SIXTH AND EIGHTH AMENDMENT RIGHTS WHEN IT AFFIRMED PETITIONER'S 264-MONTH SENTENCE BASED ON THE NOW ADVISORY FEDERAL SENTENCING GUIDELINES	9

TABLE OF CONTENTS – Continued

Page

II. THE ELEVENTH CIRCUIT UNLAWFULLY SANCTIONED THE PROSECUTOR'S UNDULY PREJUDICIAL AND INFLAMMATORY MISCONDUCT WHICH DEPRIVED PETITIONER OF A FAIR AND IMPARTIAL TRIAL AS GUARANTEED BY THE FIFTH AND SIXTH AMENDMENTS TO THE UNITED STATES CONSTITUTION 15

III. THE ELEVENTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION IN A WAY WHICH CONFLICTS WITH A RELEVANT DECISION OF THE FOURTH CIRCUIT WHEN IT UNLAWFULLY SANCTIONED THE DENIAL OF PETITIONER'S 18 U.S.C. § 4241(A) AND RELATED COMPETENCY MOTIONS THUS DENYING PETITIONER'S FIFTH AMENDMENT RIGHT TO DUE PROCESS OF LAW 20

CONCLUSION 26

APPENDIX

Eleventh Circuit Opinion 1a

District Court Judgment 48a

District Court Amended Judgment 63a

Order on Petition for Rehearing 65a

TABLE OF CONTENTS – Continued

Page

18 U.S.C. § 3553 ..... 66a

18 U.S.C. § 4241 ..... 75a

Relevant Transcript (March 1, 2006) 78a

TABLE OF AUTHORITIES

Page

CASES

Berger v. United States,
295 U.S. 78 (1935) 15, 20

Dusky v. United States,
362 U.S. 402 (1960) 21, 25

Gall v. United States,
128 S.Ct. 586 (2007) 9, 10, 11, 15

Kimbrough v. United States,
128 S.Ct. 558 (2007) 9, 11, 12, 15

Krulewitch v. United States,
336 U.S. 440 (1949) 19

Pate v. Robinson,
383 U.S. 375 (1966) 23

Rita v. United States,
127 S.Ct. 2456 (2007) 9, 10, 15

United States v. Arias-Izquierdo,
449 F.3d 1168 (11th Cir. 2006) 13

United States v. Barnes,
No. 98-50418, 1999 U.S. App. LEXIS 14929
(9th Cir. June 30, 1999) (unpublished) 14

United States v. Booker,
543 U.S. 220 (2005) 11, 14

United States v. Brant,
62 F.3d 367 (11th Cir. 1995) 13

United States v. De La Vega,
913 F.2d 861 (11th Cir. 1990) 19

TABLE OF AUTHORITIES – Continued

Page

United States v. Eldick,
443 F.3d 783 (11th Cir. 2006).....13

United States v. Jimenez,
Nos. 01-2896 & 01-2897, 2002 U.S. App. LEXIS 13255 (7th Cir. July 1, 2002) (unpublished).....14

United States v. Khan,
53 F.3d 507 (2nd Cir. 1995).....14

United States v. Mason,
52 F.3d 1286 (4th Cir. 1995).....23, 24, 25

United States v. Rahim,
431 F.3d 753 (11th Cir. 2005).....23

United States v. Regueiro,
240 F.3d 1321 (11th Cir. 2001).....14

United States v. Young,
470 U.S. 1 (1985).....15, 16, 20

CONSTITUTION, STATUTES, RULES AND OTHER

U.S. CONST. amend V .....*passim*

U.S. CONST. amend VI.....2, 12, 15, 20, 26

U.S. CONST. amend VIII.....*passim*

18 U.S.C. § 3553 .....2, 10, 11, 12, 13

18 U.S.C. § 4241 .....*passim*

U.S.S.G. § 5K2.13 app. n.1.....22

Standard 3-5.8 (b) A.B.A. Standards for Criminal Justice, 3d Ed.....16

PETITION FOR A WRIT OF CERTIORARI

Michael A. Rosin respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Eleventh Circuit appears at pages 1a to 47a of the appendix to the petition. *See also United States v. Michael A. Rosin*, 2008 U.S. App. LEXIS 1080 (11th Cir. 2008). The judgment and sentence of the District Court, which is unpublished, appears at pages 48a to 64a of the appendix to the petition.[1] *See also United States v. Michael A. Rosin*, 2005 U.S. Dist. LEXIS 30014 (M.D. Fla. 2005).

JURISDICTION

The Court of Appeals entered its judgment on January 16, 2008. The Petition for Rehearing was denied on February 25, 2008. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

[1] On March 31, 2008, the District Court entered an Amended Judgment correcting a mathematical error.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The text of § 3553(a) of Title 18 of the United States Code is reproduced at pages 66a to 74a of the Appendix to this Petition.

2. The text of § 4241(a) of Title 18 of the United States Code is reproduced at pages 75a to 77a of the Appendix of this Petition.

3. The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

4. The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been

> previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

5. The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT OF THE CASE

Introduction

On July 14, 2005, Michael A. Rosin, M.D. (Petitioner), was charged by Superseding Indictment with 35 Counts of Health Care Fraud in violation of 18 U.S.C. § 1347, and 35 Counts of Making False Statements in a Health Care Matter in violation of 18 U.S.C. § 1035. The Government also sought forfeiture in the amount of $3,206,349.21.

Counts 1-35 alleged that from "September, 1996 . . . through June, 2004 [Petitioner], a board certified physician specializing in dermatology and Mohs Surgery, devised a scheme to defraud Medicare by submitting false claims for payment for medical services." "Mohs . . . surgery [is] . . . a specialized

technique for the removal of skin cancer . . . performed in stages." (Doc-23-Pgs-3-4).[2] Medicare pays participating physicians for services "considered to be medically reasonable and necessary." (Doc-23-Pg-4). The Indictment charged that Petitioner performed biopsies, unnecessary Mohs surgeries, falsely diagnosed cancer, and submitted false claims for payment. (Doc-23-Pgs-5-6). Medicare paid Petitioner's Professional Association. (Doc-23-Pgs-6-10). Counts 36-70 alleged Petitioner made "materially false, fictitious, and fraudulent statements and entries" when he submitted claims to Medicare and certified that he performed medically necessary Mohs surgery. (Doc-23-Pg-9).

After a 17-day jury trial, Petitioner was found guilty on all counts. Petitioner's advisory guideline range was 235-293 months. Petitioner was sentenced to 264 months incarceration followed by three years supervised release, and ordered to pay restitution in the amount of $3,697,225.38. The Government was also granted a money forfeiture judgment on the forfeiture count in the identical amount of $3,697,225.38, even though the Indictment only sought $3,206,349.21.

On January 16, 2008, the United States Court of Appeals for the Eleventh Circuit affirmed Petitioner's

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[2] The citations contained herein are from *United States v. Rosin*, United States District Court, Middle District of Florida, Case No.: 8:05-CR-143-T-24MAP. Citations will contain the "docket entry" and specific page number (Doc.__:__) as referenced in the Eleventh Circuit.

convictions and sentence in a forty-seven (47) page unpublished opinion. Rehearing was denied on February 25, 2008. Petitioner's Motion for Publication of Opinion was denied on March 12, 2008.

This Petition is based on the Eleventh Circuit's sanction of: 1) an excessive sentence, 2) denial of Due Process of Law for refusing to order Petitioner be fully evaluated for competency, and 3) egregious prosecutorial misconduct. If these rulings are left to stand, this Court's precedents will have been incorrectly applied by the Eleventh Circuit.

The Sentence

The District Court imposed a 264-month sentence on Petitioner, (Doc-246-Pgs-154-155), a 57 year-old family man, with seven (7) children and a highly dependent wife, who had generously contributed both his time and money to religious and community youth organizations. (Doc-246-Pgs-154-156). Two hundred and twenty-five (225) letters of support from former patients, community leaders, family and friends were submitted to the District Court corroborating Petitioner's excellent character and community involvement. (Doc-246-Pg-156).

Former patients testified to Petitioner's excellent care, character and compassion; approximately twenty additional character and former patient witnesses were also present at sentencing. (Doc-206-Pgs-134-143, 189-197; Doc-207-Pgs-38-61). Each witness explained they had been Petitioner's patient,

their belief that the procedures performed on them were medically necessary, and urged leniency at sentencing. (Doc-206-Pgs-134-143, 189-197; Doc-207-Pgs-38-61).

Petitioner's downward departure request, based on his psychological and emotional health pursuant to U.S.S.G. § 5K2.13 (Doc-246-Pg-157), was denied. (Doc-246-Pg-168). Petitioner's objection to the U.S.S.G. § 2B1.1(b)(1)(J) 18 level adjustment predicated on loss ($4,558,666.66) related to billing for the approximately 800 victims not included in the Indictment and not proved at trial, contending the enhancement should have been only 8 levels, (Doc-225-Pgs-106-108, 114-116), was overruled. (Doc-246-Pgs-86-87).

Petitioner's sentence was based on a level 38, which included enhancements for the number of victims, amount of loss, use of sophisticated means, and causing serious bodily injury.

Government's Closing and Rebuttal Arguments

1) Initially, the Prosecutor argued all Petitioner thought about was: "how much money Petitioner was going to make," "down to the penny," "his single focus [was] billing Medicare and making money." (Doc-159-Pg-17).

2) The Prosecutor further argued that Government agents "careful[ly] and meticulous[ly]" searched Petitioner's office; seized biopsy and unlabeled,

discarded surgery slides; and that "to believe Rosin [who testified] requires you" to reject the testimony of the Government agent and the six former employees who testified. (Doc-159-Pgs-33-34).

3) Commenting on Petitioner's testimony, the Prosecutor told the jury that what Petitioner testified to "doesn't matter;" his explanations were "concocted;" and that he had "concocted a story" he "actually expects you to believe." (Doc-159-Pgs-17, 19, 20-23, 30-31).

4) In rebuttal argument, the Prosecutor told the jurors, they "can choose [Petitioner's] convoluted theory [of defense] that forces you to assume facts that you've heard no testimony about. . . ." (Doc-159-Pgs-97-98).

5) Further, the Prosecutor argued that the "defense's" argument was: "noise [that] will distract you from the truth;" "desperation;" "a desperate theory of defense;" "an attempt to confuse you;" "a distraction;" "misleading;" "unbelievable;" and "inconceivable." (Doc-159-Pgs-97, 99, 101, 103).

6) The Prosecutor then argued: "[T]he defense is talking out of both sides of their mouth[s] . . . . and they are caught in their own web trying to explain all the conduct." (Doc-159-Pg-123).

7) The Prosecutor concluded her argument, by comparing dishonest doctors with dishonest lawyers: "I understand that it is difficult to believe that a physician would do the things that [Rosin] is accused of . . . but there are . . . doctors who lie and steal, just

as there are lawyers who lie and who steal, just as there are bankers who lie and who steal. There are people in this world who lie and who steal." (Doc-159-Pgs-133-134). (Pet.App. 78a-81a).

Petitioner's almost immediate *ore tenus* Motion for mistrial based on the Government's rebuttal argument was summarily denied. (Doc-159-Pg-138).

Competency

After conviction, but prior to sentencing, Petitioner retained new counsel who questioned Petitioner's competency to proceed. (Doc-207-Pgs-205-211; Doc-220).

Dr. Hyman Eisenstein, court-qualified as an expert, testified that he spent 17 hours (after conviction but before sentencing) testing, reviewing data, interviewing family members and evaluating Petitioner. (Doc-224-Pgs-3, 18-19, 31-45). Dr. Eisenstein concluded, based on reasonable psychological and neuropsychological certainty, that Petitioner's power of reason and ability to participate in the sentencing proceedings and rationally consult with his attorney were impaired. (Doc-224-Pgs-185-186).

Petitioner's counsel's request for an 18 U.S.C § 4241 study to determine competency, or in the alternative, to permit neuro-imaging brain testing, was likewise denied. (Doc-225-Pgs-8-11, 40-47). The Court held Petitioner was not suffering from a mental disease or defect. (Doc-225-Pg-47). Counsel's request

that Petitioner be transferred to a local facility for neuro-imaging, (Doc-225-Pg-166; Doc-226), was denied. (Doc-228-Pgs-1-3; Doc-246-Pg-3).

Petitioner's counsel's request that Petitioner be sentenced pursuant to 18 U.S.C. § 3552(b) was denied. (Doc-246-Pgs-121-122).

REASONS FOR GRANTING THE PETITION

I. THE ELEVENTH CIRCUIT DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY WHICH CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT AND VIOLATES PETITIONER'S SIXTH AND EIGHTH AMENDMENT RIGHTS WHEN IT AFFIRMED PETITIONER'S 264-MONTH SENTENCE BASED ON THE NOW ADVISORY FEDERAL SENTENCING GUIDELINES

Certiorari should be granted because the "reasonableness" in sentencing all defendants, as required by *Kimbrough v. United States*, 128 S.Ct. 558 (2007), *Gall v. United States*, 128 S.Ct. 586 (2007), and *Rita v. United States*, 127 S.Ct. 2456 (2007), was not correctly implemented by the Eleventh Circuit in this case.

Petitioner's draconian sentence was erroneously upheld by the Eleventh Circuit, which approved the District Court's adherence to the now advisory Federal Sentencing Guidelines. With the emergence of

new case law from this Court, Circuit Courts of Appeals must now be properly guided on how to determine whether a District Court imposed a "reasonable" sentence. Petitioner's sentence is grossly disproportionate to the crimes for which he was convicted.

The Eleventh Circuit acknowledged this Court's statement in *Gall* that: "[i]t has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue." *Gall*, 128 S.Ct. at 598; (Pet.App. 41a). However, that cornerstone principle of Federal sentencing was disregarded *sub judice*. When considering the factors set forth in 18 U.S.C. § 3553(a), it is crystal clear that Petitioner's sentence was "substantively" unreasonable, and the Eleventh Circuit sanctioned the District Court's abuse of its discretion. *Gall*, 128 S.Ct. 597.

Although Circuit Courts may presume an imposed sentence is reasonable if properly calculated within the advisory Federal Sentencing Guidelines range, that presumption is not binding. *Rita*, 127 S.Ct. at 2459. This is an extraordinary case, impossible to be considered appropriately by the generic and mechanistic calculations of the advisory Federal Sentencing Guidelines. This case highlights the dangers of a sentencing scheme which presumes reasonableness, and those instances where Courts

mechanistically apply the "guidelines" grid. The 264-month sentence imposed here is clearly unreasonable in light of the facts of the offenses and Petitioner's personal circumstances. This Court should accept review of this case because it involves a grossly disproportionate sentence imposed on Petitioner (and others in the future) in violation of the Sixth and Eighth Amendments.

This Court made clear in *United States v. Booker*, 543 U.S. 220 (2005), that 1) the Sixth Amendment was implicated, *Id.* at 230, and 2) the Federal Sentencing Guidelines were "advisory." *Id.* at 226-227. Petitioner is mindful that the "Guidelines [are] the 'starting point and the initial benchmark'" for District Courts when crafting an appropriate sentence. *Kimbrough*, 128 S.Ct. at 574 (*quoting Gall*, 128 S.Ct. at 596). However, in order to "survive appellate inspection," *Kimbrough*, 128 S.Ct. at 575, the relevant factors of 18 U.S.C. § 3553(a) must be properly addressed and assessed. The "ultimate question" here, as in *Kimbrough*, is "whether the sentence was reasonable – i.e., whether the District Judge abused his discretion in determining that the § 3553(a)(2) factors supported a sentence" of 264 months instead of justifying a "substantial deviation from the Guidelines range." *Kimbrough*, *Id.* at 576 (*citing Gall*, *Id.*). The "reviewing court [here, the Eleventh Circuit] could not rationally conclude" that the 264-month sentence Petitioner received was the product of a "reasoned appraisal" and not an abuse of the District

Court's discretion. *Id.* The Guidelines implicated in this case are "at odds with § 3553(a)." *Id.*

18 U.S.C. § 3553(a)(2) requires that the sentence imposed:

> (A) ... reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) ... afford adequate deterrence to criminal conduct;
>
> (C) ... protect the public from further crimes of the defendant; and
>
> (D) ... provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

Under 18 U.S.C. § 3553(a) the District Court is required to impose "a sentence sufficient, but not greater than necessary" to comply with the offended Statute's purpose. Given the facts of the offenses and Petitioner's individual characteristics, the 264-month sentence was inherently unreasonable and violated Defendant's Sixth and Eighth Amendment rights.

Ironically, the Eleventh Circuit recently held:

> We must make a threshold determination that a sentence imposed is grossly disproportionate . . . , we must then consider the sentences imposed on others convicted in the same jurisdiction and the sentences imposed

> for the commission of the same crime in other jurisdictions.

United States v. Arias-Izquierdo, 449 F.3d 1168, 1186 (11th Cir. 2006); *citing United States v. Brant*, 62 F.3d 367, 368 (11th Cir. 1995). The Eleventh Circuit then ignored its own precedent *sub judice*.

The "threshold determination" here must be that the **264-month** sentence imposed on this 57 year-old, active in the community, family man, physician, is "grossly disproportionate" to his crimes and "greater than necessary" to comply with 18 U.S.C. § 3553. Once that "threshold" determination is made, the Eleventh Circuit should have considered sentences in the Eleventh and the other Circuits. This the Eleventh Circuit failed to do, or if it did, failed to appreciate and apply same within the context of Petitioner's appeal.

For example, in *United States v. Eldick*, 443 F.3d 783 (11th Cir. 2006), the Eleventh Circuit affirmed a **180-month** sentence imposed on a defendant with three prior convictions who falsely held himself out as a physician to over 2,500 patients (851 of whom suffered financial, physical, and/or emotional harm and in at least two instances, death). Eldick billed patients, Medicare and other health insurers $5,066,038.85, collected $2,715,677.02, prescribed prescription drugs (including controlled substances) without a license,[3] frequently performed shock therapy, and at least one gynecological examination on an unsuspecting patient. *Id.* at 785-786.

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[3] Petitioner never prescribed controlled substances.

In *United States v. Regueiro*, 240 F.3d 1321 (11th Cir. 2001), the Eleventh Circuit affirmed a **144-month** sentence for $15,238,489 of Medicare fraud: establishing nursing groups, recruiting individuals and physicians, and creating false documents. In *United States v. Jimenez*, Nos. 01-2896 & 01-2897, 2002 U.S. App. LEXIS 13255 (7th Cir. July 1, 2002), the Seventh Circuit affirmed a **68-month** sentence and $2,760,000 in restitution for writing false prescriptions, fraudulent billing, and creating risk of serious bodily injury. In *United States v. Barnes*, No. 98-50418, 1999 U.S. App. LEXIS 14929 (9th Cir. June 30, 1999), the Ninth Circuit affirmed a **150-month** sentence for impersonating a doctor, screening over 100,000 blood tests, approving lab reports causing plasma to be distributed and creating a risk of serious bodily injury. In *United States v. Khan*, 53 F.3d 507 (2nd Cir. 1995), the Second Circuit affirmed a **60-month** sentence for creating substantial risk to patients by conducting medical exams and prescribing drugs without regard to patient's needs. The $8,000,000 in restitution was remanded for allocation amongst the defendant-physicians.

The Eighth Amendment prohibits "cruel and unusual punishments." The Sixth Amendment addresses unreasonable sentences. *See Booker*, 543 U.S. at 230. Courts must not only be permitted, but encouraged, to impose sentences both above and below the advisory guidelines when the facts warrant same. The District Court *sub judice* abused its discretion when it imposed a **264-month** sentence on Petitioner.

The Eleventh Circuit unlawfully sanctioned Petitioner's excessive sentence, in violation of the Sixth and Eighth Amendments and in conflict with this Court's decisions in *Kimbrough*, *Gall*, and *Rita*.

II. THE ELEVENTH CIRCUIT UNLAWFULLY SANCTIONED THE PROSECUTOR'S UNDULY PREJUDICIAL AND INFLAMMATORY MISCONDUCT WHICH DEPRIVED PETITIONER OF A FAIR AND IMPARTIAL TRIAL AS GUARANTEED BY THE FIFTH AND SIXTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

This Court should grant certiorari review because the Prosecutor's outrageously egregious, unduly prejudicial and inflammatory closing argument denied Petitioner his rights to Due Process of Law and to a fair and impartial trial in violation of the Fifth and Sixth Amendments to the United States Constitution.

Although Prosecutors may "strike hard blows," they are not at liberty to "strike foul ones," *Berger v. United States*, 295 U.S. 78, 88 (1935), as were struck here in the final closing moments of trial.

This Court has "emphasize[d] that the trial judge has the responsibility to maintain decorum in keeping with the nature of the proceeding; the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct." *United States v. Young*, 470 U.S. 1, 10 (1985), *citing Quercia v. United States*, 289 U.S. 466 (1933). "[B]oth the

prosecutor and defense must be kept within appropriate bounds." *Id.* The District Court failed to fulfill its duty to keep the Prosecutor within appropriate bounds. The Eleventh Circuit likewise departed from the accepted and usual course of judicial proceedings, by failing to Order a New Trial.

Standard 3-5.8 (b) A.B.A. Standards for Criminal Justice, 3d Ed. states:

> The prosecutor should not express [her] personal belief or opinion as to the truth or falsity of any testimony or the guilt of the defendant.

See also Young, 470 U.S. at 7 (prosecutors breach their duty to refrain from overzealous conduct by commentary on the defendant's guilt in offering unsolicited personal views on the evidence).

Despite *Young* and ABA Standard 3-5.8 (b), the Prosecutor here consistently portrayed Petitioner as an unethical, greedy, money-obsessed, wealthy liar. (Doc-143-Pg-19; Doc-159-Pgs-17, 22-23, 31, 109, 134). The Prosecutor's repeated, highly inappropriate arguments substantially affected the jury's ability to impartially evaluate the evidence, thereby depriving Petitioner of his rights to Due Process of Law and a fair and impartial trial in violation of the Fifth and Sixth Amendments.

In *Young*, 470 U.S. at 11-12, this Court stated:

> Inappropriate prosecutorial comments, standing alone, would not justify a reviewing court

> to reverse a criminal conviction obtained in an otherwise fair proceeding. Instead . . . the remarks must be examined within the context of the trial to determine whether the prosecutor's behavior amounted to prejudicial error. In other words, the Court must consider the probable effect the prosecutor's response would have on the jury's ability to judge the evidence fairly.

It is clear that the Prosecutor's numerous inappropriate, outrageously egregious, and highly inflammatory prejudicial comments in closing argument substantially impaired the jury's ability to judge the evidence fairly and objectively, free of passion and prejudice.

The Eleventh Circuit ignored the (at least) seven (7) examples of prosecutorial misconduct,[4] and so far departed from the accepted and usual course of judicial proceedings when it sanctioned the Prosecutor's conduct and the District Court's clearly erroneous rulings that this Court must exercise its supervisory power. In reading the Eleventh Circuit's Opinion, this Court's need to exercise its supervisory certiorari jurisdiction becomes obvious. The Eleventh Circuit stated:

1) "Even assuming the prosecutor overstepped the bounds of prosecutorial propriety . . . ";

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[4] *See* Statement of the Case, *supra*, pp. 6-8.

2) "Although the prosecutor's remarks about the weakness of Rosin's case came close to crossing the line of propriety . . . ";

3) "Although the prosecutor would have been wise to make the point with less invective . . . " Pet.App. 13-15a

The Eleventh Circuit recognized that "a defendant's substantive rights are prejudicially affected only when a reasonable probability arises that but for the prosecutor's statements, the outcome of the trial would have been different," (Pet.App. 13a), yet *sub judice* it ignored the virtual certainty of the error which influenced the jury's verdicts.

In closing argument, the Prosecutor repeatedly told the jury that Petitioner's testimony was "false" and that Petitioner had lied and "concocted" a defense "with a straight face." (Docs-159-Pgs-22, 23, 31, 109). The prosecutor stated Petitioner was always thinking about money: "Every single procedure . . . down to the penny" and "his single goal and simple focus is billing Medicare and making money . . . " (Doc-159-Pg-17). In rebuttal, the prosecutor told the jurors that Petitioner had harmed his patients, and was a greedy liar and thief. (Doc-159-Pg-134).

The Eleventh Circuit noted the Prosecutor's improper comments on the record about "doctors, lawyers, and bankers who 'steal and lie;' " but then came to the wholly illogical and irrational conclusion that **"the prosecutor's comments were no more directed at [Petitioner's] counsel than at the prosecutor himself [sic: herself]**. The Government

was merely suggesting to the jury that successful people sometimes commit crimes." Pet.App. 15a-16a. [Emphasis added]. That the Eleventh Circuit could so easily "brush off" the Prosecutor's direct assault on Petitioner's to trial lawyers – calling them, in essence, disingenuous, deceptive liars and thieves – is mind boggling.

This is especially troubling in light of the Eleventh Circuit's own decision in *United States v. De La Vega*, 913 F.2d 861, 867 (11th Cir. 1990) (citations omitted), which acknowledged it is improper to "discredit defense counsel in front of the jury . . . and even subsequent jury instructions aimed at rectifying this error may not ensure that these disparaging remarks have not already deprived the defendant of a fair trial." *See and compare Krulewitch v. United States*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring, specially) (citations omitted) ("[t]he naïve assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction").

The Eleventh Circuit also dismissed Petitioner's argument that the Prosecutor committed misconduct by presenting a critical witness (Dr. Flowers) as a fact witness, rather than the expert opinion witness he clearly was: "The prosecutor made an obvious legal error when she argued Flowers' testimony was admissible as that of a fact witness, rather than an expert . . . However, a lawyer may be wrong without committing misconduct." The Eleventh Circuit continued: "Although the prosecutor erred when she argued Flowers was not an expert, there is no evidence she

intended to mislead the Court."[5] Pet.App. 18a-19a. Under these circumstances the Prosecutor's presumed "intent" ought not render nugatory Petitioner's rights to Due Process of Law and to a fair and impartial trial as guaranteed by the Fifth and Sixth Amendments.

When viewing the prosecutor's consistent, persistent, pervasive, prejudicial conduct in the context of the trial, *Young*, 470 U.S. at 12, and *Berger*, 295 U.S. at 88, it is clear that Petitioner's convictions could not have been secured absent the misconduct of the Government's attorney at trial. The Eleventh Circuit has so far departed from the accepted and usual course of judicial proceedings by sanctioning the behavior of the Government that certiorari review is appropriate to correct the error.

III. THE ELEVENTH CIRCUIT HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY WHICH CONFLICTS WITH A RELEVANT DECISION OF THE FOURTH CIRCUIT WHEN IT UNLAWFULLY SANCTIONED THE DENIAL OF PETITIONER'S 18 U.S.C. § 4241(A) AND RELATED COMPETENCY MOTIONS THUS DENYING PETITIONER'S FIFTH AMENDMENT RIGHT TO DUE PROCESS OF LAW

The Eleventh Circuit decision in this case violates those principles of Due Process of Law afforded

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[5] This conclusion by the Eleventh Circuit is itself most troubling, as Flowers gave only expert witness opinion testimony.

all defendants by the Fifth Amendment. The District Court improperly denied Petitioner's 18 U.S.C. § 4241 Motion (request to determine competency to proceed at sentencing), (Doc-225-Pgs-8-11, 40-47), and improperly imposed sentence on an individual who appeared to have been impaired and unable to consult rationally with his counsel to assist in his defense at this extraordinarily complex sentencing hearing, which lasted six (6) days.

The test for competency is whether "[the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding – and whether he has a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402 (1960).

The record evidence established that Petitioner was suffering from a debilitating mental disease or defect at the time he was sentenced. (Doc-224-Pgs-56, 57, 89, 94, 100, 185). The District Court should have ordered appropriate testing and evaluations to determine if Petitioner was competent to proceed with sentencing. Defense counsel's repeated requests for Petitioner to be tested and evaluated were denied in violation of the Fifth Amendment Due Process of Law guarantee. (Doc-225-Pgs-8-11, 40-47; Doc-228-Pgs-1-3; Doc-246-Pgs-3, 121-122).

Petitioner's counsel informed the Court, based on his personal experience as a practicing criminal defense lawyer for thirty-eight (38) years and his extensive observations of Petitioner, that Dr. Rosin may be suffering from a mental disease or defect

which impaired his ability to rationally assist in the sentencing proceedings. (Doc-207-Pgs-205-211; Doc-220). In addition, Dr. Hyman Eisenstein, a court-qualified expert in psychology and neuro-psychology, testified at sentencing that, as defined by the DSM-IV[6] and based on reasonably psychological and neuro-psychological certainty, Petitioner suffered from Dementia caused by head trauma, and Obsessive Compulsive Disorder with possible schizoid overlay. (Doc-224-Pgs-45, 95, 100, 103). Dr. Eisenstein, who has evaluated over 100 individuals in Court proceedings to determine competency, also identified a possible brain disorder (Right Visual Field Neglect) and concluded, again based on reasonable psychological and neuro-psychological certainty, that Petitioner was impaired to the extent that his "power of reason" and ability to participate in the sentencing proceedings and rationally consult with his attorney were compromised. U.S.S.G. § 5K2.13 app. n.1; (Doc-224-Pgs-86, 185-186, 194).

Dr. Eisenstein testified that neuro-imaging of Petitioner's brain was appropriate to objectively rule out or confirm Petitioner's incompetency. *Id.* This specific expert testimony was unrebutted, yet the District Court denied Petitioner's 18 U.S.C. § 4241(a) and related Motions. The Eleventh Circuit's opinion

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[6] In virtually all Federal and State Courts in the United States, the DSM-IV is the singularly most relied upon forensic diagnostic manual of mental disease and disorders.

notes the existing case law mandates that "[a] district court must conduct a competency hearing when there is a 'bona fide doubt' regarding the defendant's competence," *United States v. Rahim*, 431 F. 3d 753, 759 (11th Cir. 2005) (*citing Pate v. Robinson*, 383 U.S. 375, 378 (1966)), yet affirmed Petitioner's conviction, despite the clear evidence which raised a bona fide doubt as to Petitioner's competence. Pet.App. 34a.

The Eleventh Circuit's opinion conflicts with the Fourth Circuit's opinion in *United States v. Mason*, 52 F.3d 1286, 1293 (4th Cir. 1995), where the Court remanded the case to the District Court for a "retrospective determination of [the defendant's] competence." In *Mason*, the Fourth Circuit found the District Court abused its discretion in denying the defendant's motion for a competency hearing because it erroneously concluded that the evidence for incompetence must be "conclusive" to justify a full blown hearing. *Id.* "In determining whether there is a reasonable cause to order a competency hearing, a trial court must consider all evidence before it, including evidence of irrational behavior, the defendant's demeanor at trial, and medical opinions concerning the defendant's competence . . . 'Even one of these factors standing alone may, in some circumstances, be sufficient.'" *Id.* at 1290 (citations omitted). The Fourth Circuit noted that just because the defendant's demeanor during the trial phase did not demonstrate incompetence, that observation does not

permit the District Court to ignore the medical evidence before it suggesting incompetence.[7] *Id.* at 1293.

The Eleventh Circuit's decision *sub judice* directly conflicts with the Fourth Circuit's decision in *Mason*. The evidence presented by Petitioner at sentencing clearly met the "reasonable cause" threshold necessary to order a comprehensive competency evaluation so that Petitioner could be fully tested for organic neurological, and thus psychological, deficits. The only distinction between the case at bar and *Mason* is that Petitioner's competency issue here involves the determination of ability to proceed with sentencing (which counsel questioned), as opposed to the "retrospective" competency issue in the guilt phase of the *Mason* trial. There is a clear conflict between the Circuits on the standard as to when, and under what circumstances, a competency evaluation should be properly ordered by a District Court.

Defendants are entitled as a matter of Due Process of Law, and 18 U.S.C. § 4241(a), to be

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[7] The District Court ignored Eisenstein's medical testimony because it determined Petitioner's direct and cross-examination at trial "reveal[ed] a very intelligent and knowledgeable individual, able to deal with a difficult situation in a manner which would put him in the best light, with no indication of any mental defect." (Doc-225-Pg-45). The District Court ignored Dr. Eisenstein's testimony that, although Petitioner had superior intelligence, the fluctuation in his psychological testing results demonstrated discrepancies and deficiencies consistent with the potential brain damage reported in Petitioner's history. (Doc-225-Pg-64-65). *See also Mason, id.*

evaluated for competency when competency is, or becomes, an issue. The Eleventh Circuit's opinion directly conflicts with that of the Fourth Circuit's in *Mason*.

None of the District Court's reasons for refusing Petitioner's requests were supported by any, much less, competent evidence. The Court of Appeals unlawfully sanctioned the District Court's denial of Petitioner's Competency Motions. This Court has long recognized the defendant's absolute right to be able to rationally consult with counsel and assist in the defense of his case. *Dusky v. United States*, 362 U.S. 402 (1960).

Petitioner was denied Due Process of Law in violation of the Fifth Amendment when the Eleventh Circuit affirmed the District Court sentence without the benefit of an evaluation and tests which would have ruled out or confirmed organic, brain-based mental disease or defects which impaired Petitioner's ability to rationally assist counsel and knowingly participate in the proceedings.

When a District Court does not follow the law, and a Court of Appeals fails to correct the error, this Court should accept jurisdiction, so that this Petitioner's rights (and that of future defendants) are properly preserved and protected.

This Court, by granting certiorari, can resolve this conflict between Circuits.

CONCLUSION

The District Court's errors, and the Eleventh Circuit's sanctioning of same, have violated Petitioner's Fifth, Sixth, and Eighth Amendment rights. Petitioner respectfully requests this Court grant this Petition for Writ of Certiorari to resolve the conflicts in Federal law presented, and to address, and correct, the violations of Petitioner's constitutional rights, as well as protect the Constitutional rights of all future defendants confronted with the same or similar issues.

DATED: May 22, 2008

Respectfully submitted,

JOEL HIRSCHHORN*
BRIAN H. BIEBER
Attorneys for Petitioner

HIRSCHHORN & BIEBER, P.A.
550 Biltmore Way
Penthouse Three A
Coral Gables, FL 33134
Telephone: (305) 445-5320
Telecopier: (305) 446-1766

**Counsel of Record*

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 06-15538

D. C. Docket No. 05-00143-CR-T-24-MAP

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MICHAEL A. ROSIN,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

(January 16, 2008)

Before BLACK, HULL and FAY, Circuit Judges.

PER CURIAM:

Appellant Michael Rosin, a former dermatologist, once operated a lucrative dermatology practice in Sarasota, Florida. In 2004, his long-time office manager filed a *qui tam* action, contending Rosin had defrauded the government by performing hundreds of unnecessary surgeries on elderly Medicare patients. Following a government investigation, Rosin was

indicted on 35 counts of health care fraud in violation of 18 U.S.C. § 1347, and 35 counts of making false statements in a health care matter in violation of 18 U.S.C. § 1035. Following a 17-day jury trial, Rosin was convicted on all counts and sentenced to 264 months' incarceration, restitution in the amount of $3,697,225.38, and forfeiture in the amount of $3,697,225.38.

Rosin appeals his conviction and sentence on myriad grounds, contending his trial was tainted by improper evidence, prejudicial comments by the judge and prosecutor, and misleading jury instructions. Rosin also challenges the substantive and procedural reasonableness of his sentence and the legality of the court's forfeiture order. Having reviewed the record, we find Rosin's challenges to be largely without foundation. The trial itself was fundamentally fair, and Rosin's sentence was reasonable in all respects. Therefore, we affirm.

I. BACKGROUND

From 1983 to 2004, Rosin was the owner and sole physician of a dermatology clinic and laboratory in Sarasota, Florida. He employed an office manager and lab technicians to assist him in his clinical work.

Rosin was trained to perform a specialized form of dermatological surgery called Mohs surgery. The procedure is designed to minimize scarring during the removal of certain types of skin cancer, and is performed in one or more stages. During each stage, the

surgeon removes a thin layer of skin and examines it under a microscope, checking the borders for malignancy and mapping the location of any cancer. If a doctor does not see any malignancy, or determines he has removed the outer edge of the malignancy, he stops cutting or proceeds to another section of the skin where the cancer is located. The goal of surgery is to remove all malignant tissue while minimizing the removal of healthy tissue. The surgery is often performed in only one or two stages, but sometimes requires four or more stages to ensure complete removal of the cancer. Due to the time and expertise the surgery requires, it is costly and not appropriate for all patients.

Approximately 95% of Rosin's patients were elderly Medicare recipients. The federal Medicare program reimburses surgeons for Mohs surgeries at a higher rate than it reimburses for other types of skin cancer removal. The more stages the surgery requires, the higher the Medicaid reimbursement rate. From September 1998 through May 2005, Rosin performed 5,980 skin biopsies. Of these, he reported that 99.43% revealed cancer. During the same period, Rosin billed Medicare for 4,118 Mohs surgeries. He performed four stages of surgery in 98.93% of these cases.

In February 2004, Carolyn Ferrara, Rosin's office manager, filed a *qui tam* action, alleging Rosin had defrauded the Government by filing false Medicare claims and performing needless surgeries. Her

allegations led to an investigation and, ultimately, to the filing of criminal charges against Rosin.

A. The Trial

At trial, the jury heard testimony from Rosin, government investigators, character witnesses, numerous medical experts, and a number of Rosin's former employees and patients. The testimony of Rosin's former employees revealed that Rosin's laboratory was staffed by poorly trained lab technicians who prepared biopsy slides that were irregular and often unreadable. Former employees testified they had altered slides on several occasions, in one case replacing skin tissue with gum, and in another, with styrofoam. According to the employees, Rosin diagnosed cancer on both these slides.

Rosin denied reviewing slides that contained foreign substances. In addition, he challenged the credibility of his former employees, eliciting uncontroverted evidence that several, including Ferrara, had stolen from him during the course of their employment, and stood to benefit financially from the *qui tam* lawsuit.

The Government called witnesses employed by Florida's Medicare records contractor to testify regarding the general manner in which Medicare claims are processed and to summarize Rosin's billing practice. One of these custodians, Julie Kearn, testified that she had compiled data on all of Rosin's

Medicare billings for Mohs surgeries performed from January 2000 to December 2003.

The compiled data was given to Klaus Miescke, a statistician from the University of Illinois at Chicago with experience in health care fraud investigations.

At trial, Miescke testified he used the data Kearns had compiled to select a statistically random sample of 70 surgical slides from which he extrapolated loss findings. The 70 slides Miescke selected were provided to the Government's medical experts, Drs. Pearon Lang and Franklin Flowers, and to Rosin's medical experts for review.

Over Rosin's objection, the Government's experts testified at trial regarding their own surgical practices, rates of cancer diagnosis, and the percentage of four-stage Mohs surgeries each performed, in addition to offering testimony regarding their review of Rosin's slides. Three dermatology experts testified on Rosin's behalf, stating that some of the surgical slides they reviewed had revealed the presence of cancer. Although the experts' testimony differed with respect to which slides revealed evidence of skin cancer, all agreed the slides were of substandard quality and that many were unreadable.

Pathologist Deborah Bir testified regarding the manner in which surgical slides are typically created, stained, and read. She and Lang testified that the poor quality of Rosin's surgical slides was unrelated to the age of the slides or the manner in which they had been stored. The defense countered this

testimony by arguing the slides had been readable when they were assembled and had deteriorated due to age, poor assembly, or employee sabotage.

In addition to expert testimony, the jury heard from nine character witnesses, who testified Rosin was an honest, charitable, and trustworthy father, doctor, and community member.

In closing argument, the prosecutor argued Rosin's defense was not credible – that while Rosin claimed to be a caring doctor betrayed by his staff, he was in fact "greedy," and interested only in making money from the Medicare program, as evidenced by the manner in which he carefully recorded patients' financial information, but made and retained little information about their medical history and care. The prosecutor pointed out inconsistencies in Rosin's defense, and called upon jurors to ignore the defense's "attempts to confuse," calling Rosin's theory of the case "misleading" and "unbelievable."

After being given Eleventh Circuit Pattern Jury Instructions, the jury deliberated for one and a half days before convicting Rosin on all counts.

B. Sentencing

Sentencing began June 6, 2006. After two days of testimony, the court ordered the hearing continued until July 6, 2006. The Government moved to remand Rosin to the custody of the United States Marshals during the recess; the motion was granted.

When sentencing resumed on July 6, 2006, Rosin's lawyer asked the court to order a competency evaluation, alleging Rosin was unable to assist in gathering mitigating evidence for the sentencing proceedings. To show that a competency hearing was reasonably necessary, Rosin called Dr. Hyman Eisenstein, a neuropsychologist and clinical psychologist who testified for five hours regarding tests he had performed and interviews he had conducted with Rosin and Rosin's family.

Eisenstein testified Rosin was an intelligent man who suffered from cognitive deficits as a result of three head injuries, the first of which occurred in the 1960s. Although Eisenstein was unable to provide a formal diagnosis without first conducting brain scans on Rosin, he testified he could not "rule out the possibility" Rosin was suffering from dementia as a result of brain injury. When asked how Rosin's suspected dementia would affect his ability to work with counsel, Eisenstein had no answer except to observe that Rosin appeared more interested in discussing his criminal conviction than in preparing for sentencing.

Eisenstein also testified that Rosin appeared to suffer from an obsessive-compulsive disorder. According to Eisenstein, this was the reason Rosin had insisted on performing four stages of Mohs surgery for almost all of his patients. On the basis of this testimony, counsel moved the court to stay further sentencing proceedings and order a full-scale competency evaluation.

The judge noted Rosin had been articulate on the stand during his jury trial, appeared to understand the pretrial, trial, and early sentencing proceedings, and had not complained about being unable to assist his counsel until the judge ordered him remanded. The judge questioned Eisenstein's reliance on tests administered by other psychologists, and noted Eisenstein was unable to do any more than speculate about the possibility that Rosin *might* suffer some deficits from brain injuries dating back several decades. Finding no reasonable cause to believe Rosin was incompetent to participate in sentencing, the judge denied Rosin's motion for a full competency evaluation and hearing.

When sentencing resumed, Rosin raised several objections to the probation office's guideline calculation. First, Rosin asserted the enhancements for loss amount and victims should be calculated with reference only to the patients whose names were listed in the indictment. He objected to inclusion of approximately 800 patients (and the medical claims relating to those patients) on the ground that evidence about those patients and their surgeries had not been presented to the jury. In addition, Rosin asserted he should not be required to repay the Government or be subject to sentence enhancements for any surgery with respect to which any expert opined that the slide revealed evidence of cancer or was unreadable. The district court rejected Rosin's proposal, crediting Rosin only for surgeries for which the Government's expert, Dr. Flowers, had found evidence of cancer.

After finding Rosin had used sophisticated means in carrying out his crime and had caused serious bodily injury to several of his patients, the judge calculated Rosin's offense level as 38 and his criminal history category as I, yielding a guideline imprisonment range of 235 to 293 months, with a fine range of $25,000 to $250,000 dollars. (The 70 counts on which Rosin was convicted carried a cumulative maximum penalty of 700 years' imprisonment and a $17.5 million fine.) The judge sentenced Rosin to 264 months' incarceration, restitution in the amount of $3,697,225.38,[1] and forfeiture in the amount of $3,697,225.38.

II. DISCUSSION

On appeal, Rosin raises seven challenges to his conviction and sentence. He contends his trial was tainted because (1) the prosecutor introduced unfairly prejudicial evidence and argument; (2) the trial judge intervened improperly in the proceedings; (3) improper evidence was admitted; and (4) the jury was misled by three erroneous instructions. Rosin contends these errors, both alone and cumulatively, merit reversal of his conviction. In addition, Rosin challenges (5) the district court's failure to hold a full competency hearing; (6) the reasonableness of his

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[1] The court ordered Rosin to pay $3,641,247.79 in restitution to Medicare, $7,111.90 to Aetna (a private insurance company), and $48,865.69 to individual victims.

within-guideline sentence; and (7) the amount of his court-ordered forfeiture. We address each in turn.

A. Prosecutorial Misconduct

First, Rosin contends he is entitled to a new trial because the Government engaged in misconduct throughout his trial. Although many of Rosin's complaints are generalized, he appears to challenge four types of conduct, contending the Government improperly relied on evidence of his bad character in violation of Fed. R. Evid. 404(a); made inflammatory remarks about him and his counsel during closing argument; vouched for the prosecution's chief investigator; and misrepresented the testimony its expert, Dr. Flowers, would be offering at trial. Rosin did not raise contemporaneous objections to any of the alleged misconduct of which he now complains; therefore, "relief is available to rectify only plain error that is so obvious that failure to correct it would jeopardize the fairness and integrity of the trial." *United States v. Bailey,* 123 F.3d 1381, 1400 (11th Cir. 1997) (applying plain error standard in context of challenges to prosecutor's closing argument).

1. Character evidence

Rosin contends the prosecutor violated Fed. R. Evid. 404(a) during opening and closing arguments. Specifically, Rosin takes issue with the following comments made during opening argument:

> The Government is not trying to hold the Defendant accountable for honest mistakes. The evidence will show that the Defendant went through the motions to appear that he cared about his patients, and to appear that he was engaged in the honest, ethical and legal practice of medicine.
>
> But what the evidence will show is that what he really was engaged in was a scheme to defraud the Medicare system by performing medically unjustified and invasive surgeries for the single purpose of making money.

Rosin also objects to the following argument, made during closing:

> [T]he evidence in this case has presented two starkly different and irreconcilable pictures of this Defendant. He is either a caring, dedicated physician whose only concern is a devoted interest in the welfare of his patients, or he is a greedy, dishonest individual who is guilty as charged of the offense in the superceding indictment.
>
> . . . .
>
> The first and most sacred duty of a medical doctor, members of the jury, is first to do no harm. And this physician was motivated by the same thing that motivates everyone who lies and who steals. The details of their conduct may differ, but it can be explained quite simply and in one word, greed.

Rosin contends that by pointing to character traits such as greed, the prosecutor invited the jury to judge his character rather than his actions.

Although Rosin has framed his argument as a challenge to the admissibility of character evidence, he is not challenging any *evidence*; rather, he is challenging the propriety of the prosecutor's *argument*. The Government concedes that the prosecutor's remarks were "colorful and perhaps flamboyant," but is quick to point out that rhetoric is not impermissible in the courtroom. *See United States v. Smith,* 918 F.2d 1551, 1561 (11th Cir. 1990). The Government insists the prosecutor's remarks were fair commentary on the evidence adduced at trial, particularly with respect to Rosin's honesty.

Even assuming the prosecutor overstepped the bounds of prosecutorial propriety, it cannot be said that the prosecutor's statements constituted plain error when "viewed in the context of the record as a whole." *Bailey,* 123 F.3d at 1400. Even under the less exacting standard applied to review of preserved errors, this Court will reverse a defendant's conviction on the basis of prosecutorial misconduct only where the prosecutor's "remarks (1) were improper *and* (2) prejudiced the defendant's substantive rights." *United States v. O'Keefe,* 461 F.3d 1338, 1350 (11th Cir. 2006) (emphasis added). A defendant's substantive rights are prejudicially affected only when a reasonable probability arises that, but for the prosecutor's statements, the outcome of the trial would have been different. *Id.*

In this case, the jury heard extensive testimony from which it could conclude Rosin was guilty of health care fraud. Over the course of a 17-day trial, any improper comments were limited to a few sentences in opening and closing argument. The jury was instructed before it began deliberating that counsel's arguments were not evidence and that the verdict should be based on the evidence alone. Looking at the record as a whole, there is no reason to believe the prosecutor's characterization of the evidence during opening or closing arguments prejudicially affected the trial, much less obviously jeopardized its fairness and integrity.

2. Allegedly improper argument

In addition to challenging the prosecutor's remarks about Rosin's character, Rosin challenges remarks allegedly directed toward his trial counsel. During closing argument, the prosecutor accused "the defense" of "talking out of both sides of their [sic] mouth. Referring collectively to Rosin and his counsel, the prosecutor argued, "They're caught in their own web trying to explain all of the conduct that occurred in the defendant's office, and it is noise because it doesn't make sense." Finally, during his closing rebuttal, the prosecutor stated:

> I understand that it is difficult to believe that a physician, that a medical doctor, would do the things that this defendant is accused of in the superceding indictment, but there are in this world, ladies and

> gentlemen, doctors who lie and steal, just as there are lawyers who lie and steal, just as there are bankers who lie and steal. There are people in this world who lie and steal.

For reasons that are not entirely clear, Rosin is convinced that, by making these statements, the prosecutor intended to suggest to the jury that defense counsel lied and stole.

This Court has held that it is improper to "discredit defense counsel in front of the jury . . . and even subsequent jury instructions aimed at rectifying this error may not ensure that these disparaging remarks have not already deprived the defendant of a fair trial." *United States v. De La Vega,* 913 F.2d 861, 867 (11th Cir. 1990) (citing *United States v. McLain,* 823 F.2d 1457, 1462 (11th Cir. 1987), *overruled on other grounds by United States v. Lane,* 474 U.S. 438, 106 S. Ct. 725 (1986)). Despite the seriousness of such an infraction, the Court has clarified that reversal is only warranted when the entire trial is so replete with errors the defendant was denied a fair trial. *United States v. Eckhardt,* 466 F.3d 938, 947 (11th Cir. 2006).

Although the prosecutor's remarks about the weakness of Rosin's case came close to crossing the line of propriety, they did not go over the line. In attacking inconsistencies in the defense's theory of the case, the prosecutor was commenting fairly on the evidence adduced at trial, and on Rosin's competing explanations for the irregularities in his laboratory.

Although the prosecutor would have been wise to make the point with less invective, taken in context, the remarks were not clearly improper and certainly did not deny Rosin a fair trial.

With regard to the prosecutor's comments about doctors, lawyers, and bankers who "steal and lie," it is clear the prosecutor's comments were no more directed at Rosin's counsel than at the prosecutor himself. The Government was merely suggesting to the jury that successful people sometimes commit crimes. That argument was not improper.

3. Vouching

Rosin argues the prosecution improperly vouched for witness Diane New, the Government's chief investigator. Although the argument is not entirely clear, it appears to be this: In the course of investigating Rosin's crime, Agent New signed a probable cause affidavit, upon which a search warrant was issued. At trial, without objection from the defense, the prosecutor admitted the cover sheet from the search warrant, listing each of the items the agents were authorized to retrieve. On that sheet was a notation that read, "Affidavit having been made . . . by Special Agent Diane C. New." Rosin appears to contend that, from the notation, the jury could have inferred a magistrate had credited New's affidavit (or else the warrant would not have issued), and by extension, New's credibility. Rosin argues that, by admitting the cover sheet into evidence, the prosecutor "sent an unfair

and constitutionally inappropriate message to the jury of unparalleled and compelling 'proof' of R[osin]'s guilt with the very first witness."

When reviewing a defendant's vouching claim, this Court examines whether (1) the prosecutor placed the prestige of the Government behind the witness by making explicit personal assurances of the witness's credibility, or (2) the prosecutor implicitly vouched for the witness's credibility by implying that evidence not formally presented to the jury supports the witness's testimony. *United States v. Arias-Izquierdo,* 449 F.3d 1168, 1177-1178 (11th Cir. 2006). "The prohibition against vouching does not forbid prosecutors from arguing credibility ... it forbids arguing credibility based on the reputation of the government office or on evidence not before the jury." *United States v. Hernandez,* 921 F.2d 1569, 1573 (11th Cir. 1991).

On several occasions during trial the prosecutor made passing reference to the fact that a court had issued a search warrant authorizing a search of Rosin's office. The prosecutor did not connect New to the issuance of that search warrant, or comment on her credibility in any way related to the warrant. Under these circumstances, the introduction of the search warrant cover sheet did not amount to vouching. *Cf. United States v. Newton,* 44 F.3d 913, 921 (11th Cir. 1995) (prosecutor's statement bolstering a key witness's testimony by asserting "a judge, state or federal, is not going to give a ... law enforcement officer a search warrant to search anybody's house for

no reason . . . ," while close to the line, was not improper). The prosecutor did not vouch for the witness; therefore, no error was made.

4. Mischaracterization of testimony

As a final challenge to the Government's conduct at trial, Rosin contends the prosecution misrepresented the evidence Dr. Flowers would present during his trial testimony.[2] Before Dr. Flowers was permitted to testify at trial, the court held a conference outside the presence of the jury. At that conference, the prosecution explained Flowers would testify about his own dermatology practice, including the rates at which he diagnosed skin cancer and performed four stages of Mohs surgery. The prosecutor made the argument that Flowers' proposed testimony was not expert because it was grounded in the doctor's personal experience treating patients.

Rosin raised vigorous objections to the prosecution's position, insisting that, because Flowers had no personal knowledge regarding Rosin's patients, his proposed testimony had to be either expert or

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[2] In his opening brief, Rosin asserted in passing the Government had also made a misleading proffer regarding the testimony of expert witness Klaus Miescke. The substance of the argument, which Rosin did not develop in his opening brief and did not mention in his reply, appears to relate to his claim that Miescke's testimony was inadmissible. (See Section C.1, *infra*). There was no discrepancy between the Government's proffer and Miescke's testimony.

irrelevant. Rosin questioned whether Flowers' testimony was admissible under *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 113 S. Ct. 2786 (1993), and challenged the legitimacy of permitting Flowers to testify about his own practice for the purpose of inviting comparison between Rosin's and Flowers' practices.

Ultimately, however, the judge had the following exchange with defense counsel:

> Court: As I understand it, Mr. Kehoe, you have no objection to Dr. Flowers qualifying as an expert witness.
>
> Kehoe: In all candor, no, Judge. I do believe that he is one when it comes to this particular area. . . .
>
> Court: All right. When it comes to his testimony and these areas that may be subject to question by the defense, I'll entertain a sidebar if that's necessary. But, the Court will be governed and – by the case law requiring the Court, as gate keeper, to base its determination on admissibility on the relevance and reliability of the proffered testimony. So, we'll proceed on that basis.

On appeal, Rosin argues the prosecutor committed misconduct by arguing Flowers was a treating physician who could testify as a fact witness, rather than as the expert witness he clearly was. That argument is misguided. The prosecutor made an

obvious legal error when she argued Flowers' testimony was admissible as that of a fact witness, rather than an expert. *Cf.* Fed. R. Evid. 602 ("A witness may not testify to a matter unless . . . the witness has personal knowledge of the matter."). However, a lawyer may be wrong without committing misconduct. Although the prosecutor erred when she argued Flowers was not an expert, there is no evidence she intended to mislead the court. Her mistake did not prejudice Rosin in any way, much less compromise the integrity of the trial.[3]

B. Intervention by the District Court

Rosin contends the trial court improperly demonstrated bias against him and lent its weight to the Government's case by engaging in repeated questioning of witnesses, commenting on the evidence, and frequently interrupting defense counsel during questioning. Rosin did not object to the court's questions during trial; therefore, we review for plain error only. *Hanson v. Waller,* 888 F.2d 806, 813 (11th Cir. 1989); *Coats & Clark, Inc. v. Gay,* 755 F.2d 1506, 1511 (11th Cir. 1985).

A defendant is denied a constitutionally fair trial when a judge strays from neutrality, abandoning his proper role and assuming that of an advocate. *United States v. Wright,* 392 F.3d 1269, 1274 (11th Cir. 2004);

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[3] Furthermore, the trial court properly found (with Rosin's concession, no less) that Flowers *was* a qualified expert witness.

see also Fed. R. Evid. 614, Advisory Committee Note. Even when an objection to judicial conduct has been preserved, in order to amount to reversible error, a judge's remarks must demonstrate such pervasive bias and unfairness that they prejudice one of the parties in the case. *United States v. Verbitskaya,* 406 F.3d 1324, 1337 (11th Cir. 2005). Put another way, comments made by the district court will cause reversal only when they "excite a prejudice which would preclude a fair and dispassionate consideration of the evidence." *Brough v. Imperial Sterling Ltd.,* 297 F.3d 1172, 1181 (11th Cir. 2002) (internal quotation marks omitted). In determining whether the district court's comments are prejudicial, the court of appeals "must consider the record as a whole and not merely isolated remarks." *Id.* at 1181.

While a defendant is entitled to an impartial judge, it is also "well settled that a federal district judge is not relegated to complete silence and inaction during the course of criminal jury trial." *Wright,* 392 F.3d at 1274 (11th Cir. 2004) (quoting *United States v. Cox,* 664 F.2d 257, 259 (11th Cir. 1981)).

> It is axiomatic . . . "[t]hat the trial judge has a duty to conduct the trial carefully, patiently, and impartially. He must be above even the appearance of being partial to the prosecution." On the other hand, a federal judge is not a mere moderator of proceedings. He is a common law judge having that authority historically exercised by judges in the common law process. He may comment on the evidence, may question witnesses and

> elicit facts not yet adduced or clarify those presented, and may maintain the pace of the trial by interrupting or cutting off counsel as a matter of discretion.

Wright, 392 F.3d at 1274-75 (quoting *Moore v. United States*, 598 F.2d 439, 442 (5th Cir. 1979)).

Rosin's arguments with respect to the district judge are wholly without merit. In his opening brief, Rosin catalogues a number of statements and questions by the trial court he contends were improper. Having examined each, we can say with confidence that in each instance, the court did no more than ask clarifying questions, deter counsel from eliciting irrelevant testimony or testimony that lacked foundation, or prevent witnesses from giving extended testimony on irrelevant points. Although it is true the court did not question the Government's witnesses in the same way it questioned Rosin's, Rosin has not pointed to any conduct by the Government that would have warranted intervention by the court.

C. Admission of Evidence

In what is a mirror image to his judicial intervention claim, Rosin contends he was deprived of a fair trial when the district court failed to act *sua sponte* to bar allegedly inadmissible evidence, and restricted the scope of testimony by Rosin's character witnesses. By suggesting the court should have acted *sua sponte*, Rosin concedes he did not seek to bar the evidence he now challenges. When a defendant has

not preserved an objection to an evidentiary ruling, we review for plain error. *United States v. Smith,* 459 F.3d 1276, 1296 (11th Cir. 2006).

1. Miescke's Testimony

Rosin takes issue with the court's failure to prevent statistician Klaus Miescke from testifying he had been retained by the Government or that he had worked in the past for the United States Attorney's Office on health care fraud cases. Rosin argues that by stating he had been hired to "extrapolate loss figures," Miescke implied the 75 surgical slides he reviewed were representative of the whole universe of slides from which the random samples had been taken (meaning that in the cases not selected for review, Rosin had performed unnecessary surgeries at the same rate he performed them with respect to the sampled slides). According to Rosin, the district court plainly erred by permitting such testimony.

It is true Miescke invited the jury to infer his sample was a reliable microcosm of Rosin's medical practice. However, it was not error to admit the testimony. Miescke was a statistician whose job it was to obtain a representative random sample of Rosin's Mohs surgeries. From that sample, the Government's medical experts drew their conclusions about the percentage of Rosin's surgical cases that involved actual cancer, and from that sample the

Government drew its preliminary loss figures.[4] The point Rosin misses is that there was nothing improper about Miescke's testimony or the inferences to be drawn from it.

At trial, the defense conceded that Miescke was an expert statistician, qualified to perform random samplings.[5] The purpose of statistical sampling is to provide a means of determining the likelihood that a large sample shares characteristics of a smaller sample. *See, e.g.*, Laurens Walker & John Monahan, *Sampling Evidence at the Crossroads,* 80 S. Cal. L. Rev. 969, 973-74 (2007) (denoting random sampling as "a *sine qua non* of scientific research"). Therefore, it surely came as no surprise to the jury that the Government had retained Miescke for the purpose of obtaining a reliable sample and using that sample for various purposes, including the calculation of loss

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[4] Before sentencing, the Government asked their expert, Dr. Flowers, to review more than 4,000 slides recovered from Rosin's office. Consequently, the final loss figures were based on a universe of slides that was larger than Miescke's random sample.

[5] In its brief, the Government inexplicably contends Miescke was not an expert because he did not render any expert opinion. Although an expert is permitted to render an opinion, Fed. R. Evid. 703, 704, he is not *required* to do so, and failure to offer an opinion does not negate an expert's status, *see* Fed. R. Evid. 702. During the Government's proffer and during his testimony, Miescke discussed his specialized training, as well as the methodology he employs in selecting random samples. His specialized knowledge lay outside the province of the jury and rendered him an expert.

amounts (none of which Miescke revealed) in a case where the defendant was accused of health care fraud.

Rosin asserts the "court had a duty to *sua sponte* strike the testimony, chastise the Government . . . for its disingenuous representation and give a curative instruction to the jury." He is mistaken. Before Miescke testified, the trial judge heard argument from both sides regarding the permissible scope of Miescke's testimony. The Court ruled Miescke could not represent that his sampling was representative of the full breadth of Rosin's medical practice, but held Miescke could represent that his sampling was representative of the data sample he had been provided. Miescke's testimony was consistent with the court's ruling, did not go beyond the bounds of his expertise, and did not unfairly prejudice Rosin in any way.

With regard to Miescke's testimony regarding his past affiliation with the United States Attorney's Office, Rosin asserts that, by telling the jury that he had worked on health care fraud cases previously, Miescke implied Rosin had committed health care fraud. Since that was the crime with which Rosin was charged, it could hardly have surprised the jury to hear the Government selected a statistician familiar with health care fraud to analyze data relating to Rosin's case. Consequently, Miescke's testimony on that point could not have prejudiced Rosin unfairly.

2. Testimony of Flowers and Lang

Next, Rosin contends the district court erred when it allowed Government experts Flowers and Lang to testify about their own surgical practices, inviting the jury to conclude Rosin's practice was fraudulent because the Government's experts diagnosed cancer at much lower rates and performed many fewer four-stage Mohs surgeries than did Rosin. Rosin points to a host of reasons why he believes it was improper to invite a comparison between his practice and the expert witnesses' practices: he was in private practice while they were in academic clinics; he was a solo practitioner, while they were not; his patients were uniformly elderly, while their patients' ages varied; etc. Although Rosin's critiques were excellent fodder for cross-examination, they went to the weight of the evidence and not to its admissibility.

Evidence is relevant when it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." Fed. R. Evid. 401. All relevant evidence is admissible unless it is excluded under law. Fed. R. Evid. 402. The differences between the rates at which the Government's witnesses and Rosin diagnosed cancer and performed multi-stage Mohs surgery did not provide conclusive proof that some of Rosin's surgeries were medically unnecessary and fraudulent. Nevertheless, if the testimony of the expert witnesses was believed,

the stark differences between their surgical procedures and outcomes and Rosin's were probative on the question whether Rosin had defrauded the Medicare program by filing false claims.

Rosin is right when he asserts the expert witnesses' testimony was prejudicial, as all evidence of guilt is intended to be. It was not, however, *unfairly* prejudicial in violation of the rules of evidence or Rosin's rights under federal law. The trial court did not err by failing to prevent the experts from testifying about their medical practices.

3. Failure to inform jury of witnesses' expert status

Rosin contends it was reversible error for the court not to inform the jury that Miescke, Bir, Lang, and Flowers were expert witnesses, and to specify their areas of expertise. Rosin cites no law for the proposition that courts must instruct juries on the scope of an expert's specialized knowledge, and we can think of no reason why they should be required to do so.

At the close of trial, the judge instructed the jury as follows:

> Now, when the knowledge of a technical subject matter might be helpful to the jury, a person having specialized training or experience in that technical field is permitted to state an opinion concerning those technical matters. Merely because such a witness has

> expressed an opinion, however, does not mean that you must accept that opinion. The same as with any other witness, it is up to you to decide whether to rely upon it.

The judge exercised his gatekeeping responsibilities by ruling on specific evidentiary objections during the trial, thereby preventing the expert witnesses from testifying to matters outside their relevant expertise. Having done so, there was no need for him to specifically identify which witnesses were "expert" and which were not. He properly instructed the jury to weigh the facts themselves, relying on specialized knowledge or testimony only when it was helpful to their deliberations.

4. Mitigating character evidence

Rosin contends the trial court prevented him from fully presenting his defense by limiting his ability to elicit background testimony from his character witnesses, and by limiting the scope of those witnesses' testimony. The transcript tells a different story.

Rosin called a number of witnesses to testify that he was honest, kind, and charitable. In response to Government objections, the trial court ruled:

> A witness may be asked what his opinion is of the truthfulness of the Defendant, and can state that, in his opinion, the Defendant is a truthful person. The other testimony about charitable activities of the Defendant are

> [sic] not relevant, and I think they should be kept to a minimum.

Although Rosin may have wished to admit more testimony on the point, the trial court properly limited him to presenting evidence relevant to the case.

With respect to Rosin's allegation that the court curtailed his ability to elicit background facts from his witnesses, Rosin has not pointed to any improper interruptions on the part of the trial court. When witness testimony strayed far afield, the court intervened on several occasions to keep the case running smoothly. The court did so in a manner that was respectful and well within its prerogative.[6]

D. Jury Instructions

Rosin next contends the jury instructions on reasonable doubt, character evidence, and good faith misled the jury and therefore necessitate a new trial. His argument fails for two reasons: First, he himself proposed the instructions, and second, they were not erroneous.

As Rosin concedes, the law is clear that when a party invites an error by proposing an instruction he later challenges, or by affirmatively accepting an

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[6] *See, e.g.*, Testimony of Mr. Samuel Uretsky, District Court Dkt. #156, at 74:17-75:23 (court directed counsel to "move on" after asking character witness extensive questions about his military service in the 1940s).

instruction proposed by an opposing party, this Court is precluded from reviewing the error on appeal. *United States v. Silvestri,* 409 F.3d 1311, 1337 (11th Cir. 2005). That alone is reason for affirming the lower court's instruction. It is not the only reason, however.

In relevant part, the instruction on reasonable doubt stated:

> [W]hile the Government's burden of proof is a strict or heavy burden, it is not necessary that the Defendant's guilt be proved beyond all possible doubt[.] [I]t is only required that the Government's proof exclude any reasonable doubt concerning the Defendant's guilt.

Rosin contends the use of the phrase "only required" minimized the Government's burden of proof. Read in the context of the whole instruction, however, it is clear the phrase to which Rosin objects was included in the instruction to help the jury understand the prosecution's burden. The instruction emphasizes the Government bears a "strict or heavy" burden. At the same time, the instruction guards against a reading of "reasonable doubt" that would require the Government to disprove all possible doubt – a burden higher than the law requires. The instruction is accurate, and it was not error for the district court to charge the jury in the words it did.

Similarly, Rosin's challenge to the instruction on character evidence is without merit. The character evidence instruction stated:

> Now, the Defendant has offered evidence of the Defendant's traits of character and such evidence may give rise to a reasonable doubt. Where a Defendant has offered testimony that the Defendant is an honest and truthful person, the jury should consider that testimony along with all the other evidence in deciding whether the Government has proved beyond a reasonable doubt that the Defendant committed the crimes charged.

The instruction made no mention of testimony regarding the defendant's character for any trait other than truthfulness.

Rosin contends the instruction was flawed because it directed the jury to consider evidence of Rosin's "truthfulness," but did not invite the jury to consider evidence that Rosin was a "caring, compassionate, kind, and charitable" person. Rosin argues that without such an instruction, the jury "likely disregarded all Rosin's other positive character traits" in reaching their verdict. This, he asserts, was error.

Rosin appears to believe his general character for kindness and charity was relevant because the prosecution characterized him as a greedy doctor who was more interested in making money from Medicare than in caring for his patients. That argument betrays a misunderstanding of the role character evidence played in the trial. The jury was not asked to determine whether Rosin was good (honest, kind, etc.) or bad (greedy, cruel, etc.): it was asked to determine whether he defrauded the Medicare system

by making false statements and engaging in health care fraud. Insofar as honesty is the opposite of fraudulent misstatement, then Rosin's integrity in requesting payment for necessary surgeries was a legitimate consideration. His general character was not. Nothing about the character instruction was incorrect and there is no reason to believe it misled the jury in any way.

Rosin's challenge to the good faith instruction is only slightly more substantial. As he points out, and the Government concedes, neither the parties nor the district court tailored the pattern instruction to the facts of his case. Specifically, Rosin takes issue with the italicized portion of the instruction below:

> Now, one who expresses an honestly held opinion or an honestly formed belief is not chargeable with fraudulent intent even though the opinion is erroneous or the belief mistaken. And similarly, evidence which establishes only that a person made a mistake in judgment or an error in management or was careless does not establish fraudulent intent.
>
> On the other hand, *an honest belief on the part of the defendant that a particular business venture was sound* and would ultimately succeed would not in and of itself constitute good faith as that term is used in these instructions if, *in carrying out the venture* the defendant knowingly made false or fraudulent representations to others with the specific intent to deceive them.

(Emphasis added.) Rosin argues the fraud with which he was charged was not related to a business venture; therefore, the reference to unsound "business ventures" should have been deleted from the instruction.

Perhaps, but not necessarily. Billing Medicare and other health insurers for surgeries is part of the business of running a medical clinic. Understood in this way, the instruction is accurate. Rosin has not suggested any way the jury would have been mislead in its deliberations by the improper instruction, and none is apparent. There was no error in providing this instruction to the jury.

E. Cumulative Errors

Having reviewed the alleged errors of the trial judge and prosecutor individually, the Court must also "review the prejudicial effect of *all* . . . errors, evaluated under both preserved and plain error standards, in the aggregate." *United States v. Baker,* 432 F.3d 1189, 1203 (11th Cir. 2005); *United States v. Blasco,* 702 F.2d 1315, 1329 (11th Cir. 1983) ("A piecemeal review of each incident does not end our inquiry. We must consider the cumulative effect of these incidents and determine whether, viewing the trial as a whole, appellants received a fair trial as is their due under our Constitution.").

In this case, there are no errors to aggregate. Having concluded no substantial errors occurred at trial, there is no more to consider with respect to this claim. *Cf. Delaware v. Van Arsdall,* 475 U.S. 673, 681,

106 S. Ct. 1431, 1436 (1986) ("[T]he Constitution entitles a criminal defendant to a fair trial, not a perfect one.").

F. Competency Hearing

Next, Rosin contends the district court abused its discretion by failing to order a competency evaluation and hold a hearing on whether Rosin was able to assist his counsel in preparing for sentencing due to brain injuries he had allegedly incurred decades earlier. *See United States v. Nickels*, 324 F.3d 1250, 1251-52 (11th Cir. 2003) (appellate court reviews denial of motion for determination of competency under 18 U.S.C. § 4241 for abuse of discretion).

In determining whether a defendant is competent to be sentenced, the district court must look at evidence indicating "a present inability to assist counsel or understand the charges" against him. *Medina v. Singletary*, 59 F.3d 1095, 1107 (11th Cir. 1995). Federal law provides:

> At any time after the commencement of a prosecution for an offense and prior to the sentencing of the defendant, or at any time after the commencement of probation or supervised release and prior to the completion of the sentence, the defendant or the attorney for the Government may file a motion for a hearing to determine the mental competency of the defendant. The court shall grant the motion, or shall order such a hearing on its own motion, if there is reasonable cause

> to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense.

18 U.S.C. § 4241(a). Put another way, "[a] district court must conduct a competency hearing when there is a 'bona fide doubt' regarding the defendant's competence." *United States v. Rahim,* 431 F.3d 753, 759 (11th Cir. 2005) (citing *Pate v. Robinson,* 383 U.S. 375, 385, 86 S. Ct. 836, 842 (1966)).

After hearing five hours of testimony from Rosin's expert witness, Dr. Eisenstein, the district court concluded a full blown competency evaluation and hearing was not needed. Although Eisenstein asserted Rosin suffered from cognitive deficits as a result of three head injuries, dating from the 1960s through the present, Eisenstein acknowledged Rosin had above-average intelligence and was unable to say how the alleged deficits affected Rosin's daily life at all, much less to a degree that would interfere with his ability to assist counsel.

In denying the motion for a competency evaluation, the district judge noted Rosin had been articulate on the stand during his jury trial, appeared to understand the pretrial, trial, and early sentencing proceedings, and had at no time prior to his detention made any complaint about being unable to understand what was happening or assist counsel in his

defense. The judge reasonably questioned Eisenstein's reliance on tests administered by other psychologists, and noted Eisenstein was unable to do any more than speculate about the possibility Rosin *might* suffer some deficits from brain injuries dating back several decades. Finding no reasonable cause to believe that Rosin was incompetent to participate in sentencing, the judge denied Rosin's motion for additional brain imaging tests and a subsequent competency hearing. His ruling was logical and well-articulated, and was not an abuse of discretion.

G. Sentencing

Lastly, Rosin raises challenges to both the duration of his sentence and the lawfulness of the court's forfeiture order. He contends the district court erred in calculating his Guidelines sentence and in failing to vary downward from the guideline range. In addition, Rosin contends the court's forfeiture order violated his rights under the Eighth and Fifth Amendments.

1. Sentence duration

Challenges to the duration of a sentence may come in either of two forms: procedural or substantive. Rosin contends the court erred procedurally when it applied improper sentencing enhancements, and erred substantively when it imposed a sentence longer than needed to achieve the purposes of sentencing.

a. Guidelines calculation

When reviewing a district court's sentencing decision, this Court "must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, [or] failing to consider the § 3553(a) factors. . . . " *Gall v. United States,* ___ U.S. ___, 128 S. Ct. 586, 597 (2007). This Court reviews a sentencing court's application of the Sentencing Guidelines *de novo. United States v. Edmonds,* 348 F.3d 950, 952-53 (11th Cir. 2003).

According to Rosin, the district court miscalculated the applicable guideline range in three ways. First, Rosin contends, the district court violated *United States v. Booker,* 543 U.S. 220, 125 S. Ct. 738 (2005), by enhancing his sentence based on estimations of the loss amount and the number of victims. The jury did not find these facts to be true beyond a reasonable doubt; therefore, Rosin contends they were improperly used to enhance the severity of his sentence.

This Court explained in *United States v. Rodriguez* that "the use of extra-verdict enhancements in an advisory guidelines system is not unconstitutional." 398 F.3d 1291, 1301 (2005); *see also United States v. Chau,* 426 F.3d 1318, 1323-24 (11th Cir. 2005) (holding *Booker* does not prohibit district court enhancement based on facts found by a preponderance of the evidence and not charged in the indictment,

under an advisory sentencing scheme). So long as the judge views the Guidelines as advisory and finds relevant facts by a preponderance of the evidence, he may rely on facts not before the jury to enhance the sentence. *United States v. Douglas,* 489 F.3d 1117, 1129 (11th Cir. 2007). That is what happened here.

Relying on the testimony of Dr. Flowers (the expert witness who reviewed the greatest number of slides), the court concluded Rosin committed fraud with respect to more than 800 different victims, and the losses associated with those victims exceeded $4 million. The court's reliance on the extra-verdict enhancements was proper and did not violate the Constitution.

Next, Rosin contends the court erred by enhancing his sentence based on his use of sophisticated means. A district court's finding that sophisticated means were used in the commission of a crime is a finding of fact we review for clear error. *United States v. Barakat,* 130 F.3d 1448, 1456 (11th Cir. 1997).

The Sentencing Guidelines provide for a two-level enhancement if an offense involves "sophisticated means." U.S.S.G. § 2B1.1(b)(9)(C) (2006). The commentary on that section states that sophisticated means are:

> especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense. For example, in a telemarketing scheme, locating the main office of the scheme in one jurisdiction but

> locating soliciting operation in another jurisdiction ordinarily indicates sophisticated means. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts also ordinarily indicates sophisticated means.

U.S.S.G. § 2B1.1(b)(9)(C) cmt. n. 8(B). There is no requirement that each of a defendant's individual actions be sophisticated in order to support imposition of the enhancement; rather, it is sufficient if the totality of the scheme was sophisticated. *Cf. United States v. Finck,* 407 F.3d 908, 915 (8th Cir. 2005) ("Repetitive and coordinated conduct, though no one step is particularly complicated, can be a sophisticated scheme.").

Rosin contends his scheme to defraud Medicare was not sophisticated because he performed routine surgeries and did not use "complex tactics to cover up his fraud." However, the evidence adduced at trial revealed Rosin ran a laboratory staffed with poorly trained technicians, directed his staff to discard surgical slides, and performed complicated multistage surgeries in a manner designed to maximize his profits while appearing falsely to treat skin cancer. Given those facts, the court did not clearly err in finding Rosin's means were "sophisticated" within the meaning of the enhancement.

Thirdly, Rosin contends there was no evidence to support the district court's finding that his patients had suffered serious bodily injury as a result of his

criminal activity. Section 2B1.1(b)(12) of the United States Sentencing Guidelines provides a two-level enhancement for crimes involving the "conscious or reckless risk of death or serious bodily injury. . . . " Serious bodily injury is defined as injury "involving extreme physical pain or the protracted impairment of a function of a bodily member, organ, or mental faculty; or requiring medical intervention such as surgery, hospitalization, or physical rehabilitation." U.S.S.G. § 1B1.1, cmt. n.1(L) (2006).

In arguing there was no evidence to justify a finding of serious bodily injury, Rosin misrepresents the facts. After hearing from numerous patients during the sentencing hearing, the judge concluded that at least two had suffered serious physical injuries above and beyond surgery as a result of Rosin's conduct. The judge did not err by enhancing Rosin's guideline range accordingly.

b. Failure to vary

If a district court's sentencing decision is procedurally sound, the appellate court must "consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard." *Gall*, 128 S. Ct. at 597. When conducting this review, the court must take into account the totality of the circumstances, including the extent of any variance from the guideline range. *Id.*

Rosin contends his sentence was substantively unreasonable because the district court failed to vary

downward on the basis of his charitable contributions, his family's need for support, his payment of restitution in full, and his allegedly diminished mental capacity. In both *Gall* and *Rita v. United States,* 551 U.S. ___, 127 S. Ct. 2456 (2007), the Supreme Court held that, in reviewing sentences for substantive reasonableness under 18 U.S.C. § 3553(a), federal appellate courts may apply a presumption of reasonableness to district court sentences imposed within the guideline range. *Gall,* 128 S. Ct. at 591; *Rita,* 127 S. Ct. at 2463. Although this Circuit has declined to adopt such a presumption, the Court has acknowledged the rationale in *Rita* "calls into question our reasons for not affording a presumption of reasonableness," *United States v. Campbell,* 491 F.3d 1306, 1314 n. 8 (11th Cir. 2007), and has held that "ordinarily we would expect a sentence within the Guidelines range to be reasonable." *United States v. Talley,* 431 F.3d 784, 788 (11th Cir. 2005).

In this case, the trial judge listened to multiple days of testimony, hearing evidence from experts, former patients, and members of the community about Rosin's character, his actions, and the effects of his crime. Rosin points to other cases in which individuals convicted of Medicare fraud received sentences lighter than his. That fact alone is no reason for this court to vacate Rosin's sentence: different defendants often receive different sentences, as the facts of each case require. *See Gall,* 128 S. Ct. at 598 ("It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider

every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue."). Unless a sentence is grossly disproportionate to the offense committed we do not even consider the sentences imposed on other offenders who have committed similar crimes. *United States v. Arias-Izquierdo,* 449 F.3d 1168, 1186 (11th Cir. 2006).

It is true Rosin received a long sentence; however, it is also true he was found guilty of committing serious crimes that extended over a protracted period. His crimes affected elderly persons, abused a position of trust, and cost the Government millions of dollars. Although Rosin points to mitigating evidence, such as his charitable works and the needs of his wife and children, the district court found those facts insufficient to justify a sentence outside the guideline range. Finding neither mitigating nor aggravating circumstances in Rosin's case, the district court imposed a sentence in the middle of the guideline range. We cannot say he abused his discretion by doing so.

2. Forfeiture

Rosin raises two distinct challenges to his forfeiture order. First, he contends that because the court ordered full restitution, the forfeiture order is an excessive fine that violates the Eighth Amendment. Second, Rosin challenges the $490,876.11 difference between the amount of forfeiture sought in the

indictment and the amount ordered at sentencing as an impermissible material variance.

a. Excessive fine

When sentencing a defendant convicted of a federal health care offense, district courts are required to "order the person to forfeit property, real or personal, that constitutes or is derived, directly or indirectly, from gross proceeds traceable to the commission of the offense." 18 U.S.C. § 982(a)(7). Rosin does not challenge the court's ability to order him to pay forfeiture, but contends the amount ordered – $3,697,225.38 – is excessive, particularly in light of the fact he made full restitution to the Medicare program. Rosin failed to raise his objection to the trial court; therefore, we review for plain error only. *United States v. Raad,* 406 F.3d 1322, 1323 (11th Cir. 2005).

Under the Eighth Amendment, a forfeiture is excessive "if it is grossly disproportional to the gravity of a defendant's offense." *United States v. Bajakajian,* 524 U.S. 321, 334, 118 S. Ct. 2028, 2036 (1998). Because excessiveness "is a highly subjective judgment, the courts should be hesitant to substitute their opinion for that of [Congress]." *United States v. 817 N.E. 29th Drive,* 175 F.3d 1304, 1309 (11th Cir. 1999) (citing *Bajakajian,* 524 U.S. at 334, 118 S. Ct. at 2037 ("judgments about the appropriate punishment for an offense belong in the first instance to the legislature")). If the value of forfeited property is

within the range of fines prescribed by Congress, a strong presumption arises that the forfeiture is constitutional. *817 N.E. 29th Drive,* 175 F.3d at 1309.

In this case, the maximum fine authorized by statute was $250,000 for each crime Rosin committed. 18 U.S.C. § 3571(b)(3). He was convicted on 70 counts, which led to a maximum fine of $17.5 million dollars. Although the recommended guideline fine was substantially less than that amount ($250,000), given the fact Rosin defrauded the Government of more than $3.6 million, it is difficult to say a forfeiture twice that amount is unconstitutional, particularly in light of the fact that Rosin's net worth exceeded $11 million.

Rosin contends the court should have taken account of his restitution when setting the amount of his forfeiture. While superficially appealing, this argument fails to account for the different goals served by restitution and forfeiture. *See United States v. Leahy,* 434 F.3d 773, 793 n.8 (7th Cir. 2006) ("While we recognize to the untrained eye, this might appear to be a 'double dip,' restitution and forfeiture serve different goals. . . . "). The goal of restitution is to compensate victims for their losses, *see, e.g.*, 18 U.S.C. §§ 3556, 3663(a)(1) (authorizing restitution to compensate victims of criminal offenses), while the goal of forfeiture is to punish, *United States v. Dicter,* 198 F.3d 1284, 1289 (11th Cir. 1999). That a defendant may ultimately be ordered to pay in restitution and forfeiture more than he took is of little consequence:

> [P]aying restitution plus forfeiture at worst forces the offender to disgorge a total amount equal to twice the value of the proceeds of the crime. Given the many tangible and intangible costs of criminal activity, this is in no way disproportionate to the harm inflicted upon government and society by the offense.

United States v. Various Computers and Computer Equipment, 82 F.3d 582, 588 (3d Cir. 1996) (quotation marks and brackets omitted).

Although Rosin's forfeiture amount was high, so was the amount by which he defrauded the Government. The forfeiture order did not violate the Excessive Fines Clause of the Eighth Amendment.

b. Variance

Lastly, Rosin contends his forfeiture order was invalid because there was a material variance between the amount sought in the indictment and the amount the court ordered him to pay. As an initial matter, we question whether the theory of material variance even applies to forfeiture decisions, which implicate a defendant's right to be free from excessive punishment, *see supra,* rather than his right to notice of the charges against him, *United States v. Ratliff-White,* 493 F.3d 812, 819 (7th Cir. 2007) (material variance implicates defendant's Fifth Amendment right to be informed of nature and cause of accusation against him and Sixth Amendment right to indictment by grand jury). The claim that a

material variance exists between indictment and proof adduced at trial is a "form of challenge to the sufficiency of the evidence," *United States v. Jenkins*, 779 F.2d 606, 616 (11th Cir. 1986). Rosin does not point to precedent in this Circuit or any other applying the law of material variance to a sentencing, fine, or forfeiture decision, and our independent search has revealed none.

Nevertheless, for the sake of argument, we note "[a] variance exists where the evidence at trial proves facts *different* from those alleged in the indictment, as opposed to facts which, although not specifically mentioned in the indictment, are entirely consistent with its allegations." *United States v. Gold*, 743 F.2d 800, 813 (11th Cir. 1984). "The standard of review for whether there is a material variance between the allegations in the indictment and the facts established at trial is twofold: First, whether a material variance did occur, and, second, whether the defendant suffered substantial prejudice as a result." *United States v. Chastain*, 198 F.3d 1338, 1349 (11th Cir. 1999).

Rosin points out that in the superceding indictment, the Government requested forfeiture in the amount of $3,206,349.21. However, after the Government's expert testified to a higher loss amount, the court ordered $3,697,225.38 in restitution – a difference of $490,876.11. The difference between the amount listed in the indictment and the amount Rosin was ordered to pay differed by half a million dollars, a large sum of money, but an amount only

15% greater than the amount requested in the indictment. Considered in context, it is doubtful the "variance" could be considered "substantial."

Assuming the difference *was* significant enough to qualify as a substantial variation from the amount sought in the indictment, the next question would be whether the difference substantially prejudiced Rosin. To show that it did, Rosin would be required to demonstrate that "the proof at trial differed so greatly from the charges that [he] was unfairly surprised and was unable to prepare an adequate defense." *United States v. Alred,* 144 F.3d 1405, 1415 (11th Cir. 1998). Rosin makes no effort to explain how he was prejudiced by the higher amount proven at sentencing, and it is difficult to see how he would have been.

The court's forfeiture order was equivalent to the amount of money Rosin had received from Medicare, patients, and patients' insurers as a result of the fraudulent surgeries. Rosin's counsel had the opportunity to argue at sentencing that the court had included too many surgeries in assessing the extent of the fraud, and, in fact, he presented competing expert testimony on the point. Although the court ultimately rejected Rosin's argument, he cannot say he was unfairly surprised by the Government's position and was unfairly prejudiced by it. Therefore, even if there could be a material variance between the amount sought in an indictment and the amount ordered

forfeited following conviction, Rosin has not shown such a variance existed in this case.

AFFIRMED.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

vs.

Michael A. Rosin

JUDGMENT IN A CRIMINAL CASE

CASE NUMBER: 8:05-cr-143-T-24MAP

USM NUMBER: 42810-018

Defendant's Attorney:
Joel Hirschhorn,
Gregory Kehoe, ret

THE DEFENDANT:

___ pleaded guilty to count(s).

___ pleaded nolo contendere to count(s) which was accepted by the court.

_X_ was found guilty on counts one through 70 after a plea of not guilty.

TITLE & SECTION	NATURE OF OFFENSE	OFFENSE ENDED	COUNT
18 USC §1347	Health Care Fraud	6/16/04	1-35
18 USC 1035	Making a False Statement in a Health Care Matter	5/20/04	36-70

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

___ The defendant has been found not guilty on count(s)

___ Count(s) (is) (are) dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States Attorney of any material change in economic circumstances.

Date of Imposition of Sentence:
October 4, 2006

/s/ William J. Castagna
WILLIAM J. CASTAGNA
SENIOR UNITED
STATES DISTRICT
JUDGE

DATE: October 12th, 2006

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of ONE HUNDRED TWENTY (120) MONTHS as to Count 1 and 2: TWENTY-FOUR (24) MONTHS as to Count 3, each count to run consecutive to each other; SIXTY (60)

MONTHS as to Counts 4 through 70, to run concurrent to each other and to all other counts for a total of 264 Months.

_X_ The court makes the following recommendations to the Bureau of Prisons: FCI Miami or FCI Coleman

_X_ The defendant is remanded to the custody of the United States Marshal.

___ The defendant shall surrender to the United States Marshal for this district.

___ at ___ a.m./p.m. on ___.

___ as notified by the United States Marshal.

___ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

___ before 2 p.m. on ___.

___ as notified by the United States Marshal.

___ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
United States Marshal

By: _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of *THIRTY-SIX (36) MONTHS as to each Count to run concurrently.*

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

_X_ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. However, the Court authorizes random drug testing not to exceed 104 tests per year. (Check, if applicable).

X The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable).

If this judgment imposes a fine or restitution it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record of personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall also comply with the following additional conditions of supervised release:

X The defendant shall provide the probation officer access to any requested financial information.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Total Restitution
Totals:	$7,000	$25,000	$3,697,225.38

___ The determination of restitution is deferred until ___. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

___ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all non-federal victims must be paid before the United States.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
SEE ATTACHED LIST			
Totals:	$3,697,225.38	$3,697,225.38	

—— Restitution amount ordered pursuant to plea agreement $_____.

—— The defendant must pay interest on a fine or restitution of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

—— The court determined that the defendant does not have the ability to pay interest and it is ordered that:

___ the interest requirement is waived for the ___ fine ___ restitution.

___ the interest requirement for the ___ fine ___ restitution is modified as follows:

---

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for the offenses committed on or after September 13, 1994, but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A. X Lump sum payment due immediately.

B. ___ Payment to begin immediately (may be combined with ___ C, ___ D or, ___ F below); or

C. ___ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D. ___ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E. ___ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time, or

F. ___ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of

Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

___ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate:

___ The defendant shall pay the cost of prosecution.

___ The defendant shall pay the following court cost(s):

_X_ The defendant shall forfeit the defendant's interest in the following property to the United States: $3,697,225.38.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

Michael Rosin
8:05-CR-143-T-24MAP
VICTIM LIST
October 4, 2006

Victims	Losses Claimed
James D. Robbins	$240.00
William Cunningham	$150.00
Donald O. Nixon	$338.60
Curtis H. Hood	$63.58
Robert B. Curtis	$477.21
Eunice Sheehan	$550.00
Victor N. Levy	$3,094.34
Richard E. Applas	$1,280.71
Mary Lee Applas	$333.54
John Blake	$144.69
Laurence E. Thomas Flora B. Thomas	$2,729.81
WPS Health Insurance	$2,373.52
Charles J. Bencie	$660
John L. Scott & Mary Scott	$1,000
Yolanda Kheralla	$1,012.07
Jeanne M. Swank	$637.40
Russell W. Swank	$652.52
John P. Noble	$1,037.01
Jane E. Tracy	$400

Robert L. Hunt	$3,661.90
Jean Schnurie	$3,957.31
Willis Winters	$1,847.45
John Fancher	$1,871.71
Roy E. Massey	$2,437.07
Margaret M. Sowney	$2,233.78
Marie D. Avrutik	$360
Robert F. Avrutik	$360
Dorothy J. Clancy	$656.94
Otis W. Wortham	$429.50
June Wortham	$1,371.51
William H. Merritt	$376.47
Robert L. Harper	$392.84
Warren Anderson	$200
Katrina A. Jacobs	$626.30
Richard Stevenson	$960
William Woods	$623.73
Patricia Harris	$367.55
John D. Odell	$910.90
Ellen M. Murray	$2,587.83
Frances Wasner	$789.73
Dolores R. Wilson	$3,668.12
Sub TOTAL:	**$48,865.69**
Aetna Insurance Company	**$7,111.90**

Medicare	**$3,641,247.79**
TOTAL:	**$3,697,225.38**

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES
OF AMERICA,

Plaintiff,

v.

Case No.
8:05-cr-143-T-24MAP

MICHAEL A. ROSIN,

Defendant.

FORFEITURE MONEY JUDGMENT

THIS CAUSE comes before the Court upon oral motion of the United States of America for entry of a Forfeiture Money Judgment, which, upon entry, shall be a final order of forfeiture as to defendant Michael A. Rosin. The Court, being fully advised in the premises, hereby finds that defendant Michael A. Rosin obtained funds in the amount of the amount of $3,697,225.38 USD as a result of his scheme to commit health care offenses in violation of 18 U.S.C. § 1347, and making false statements in health care matters, in violation of 18 U.S.C. § 1035, as alleged in the Indictment and for which the Jury found him guilty.

The Court further finds that, pursuant to the provisions of 18 U.S.C. § 982(a)(7) and Fed. R. Crim. P. 32.2(b)(2), the government is entitled to a personal money judgment against Dr. Michael A. Rosin in the amount of the gross proceeds of the health care

violations, which is $3,697,225.38 USD. Accordingly, it is hereby

ORDERED, ADJUDGED and **DECREED** that the United States' motion is GRANTED.

It is FURTHER **ORDERED** that defendant Michael A. Rosin is personally liable to the United States of America for a forfeiture money judgment in the amount of $3,697,225.38 USD, pursuant to the provisions of 18 U.S.C. § 982(a)(7) and Fed. R. Crim. P. 32.2(b)(2).

DONE and **ORDERED** in Chambers in Tampa, Florida, this 12th day of October, 2006.

/s/ William J. Castagna
HONORABLE WILLIAM J. CASTAGNA
UNITED STATES DISTRICT JUDGE

Copies to: Anita M. Cream, AUSA
Attorneys of Record

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES
OF AMERICA

v.

MICHAEL A. ROSIN

Case No.
8:05-cr-143-T-24MAP

ORDER AND AMENDED JUDGMENT

This cause comes on for consideration of the United States of America's Motion to Correct Judgment (D-258). The Government states that it made mathematical mistakes in calculating the subtotal and total restitution figures. The Government requests the Court to correct the Judgment by changing the restitution payable to the individual victims to $47,865.64 and the total amount of restitution to $3,696,225.33. Defendant does not object to the motion. The Court finds the relief requested is appropriate.

The Court ORDERS as follows:

(1) The United States of America's Motion to Correct Judgment (D-258) is GRANTED.

(2) The October 12, 2006 Judgment in a Criminal Case as to Michael A. Rosin is hereby AMENDED and MODIFIED, in accordance with the foregoing, to reflect a restitution Sub TOTAL of $47,865.64 and a total loss and restitution TOTAL of $3,696,225.33

(3) All remaining provisions of the October 12, 2006 Judgment are hereby ratified and confirmed.

DONE and ORDERED in Tampa, Florida on March 31, 2008.

/s/ William J. Castagna
HONORABLE WILLIAM J. CASTAGNA
SENIOR UNITED STATES DISTRICT JUDGE

Copies furnished to:

United States Marshal
United States Attorney
United States Probation Office
United States Pretrial Services Office
Counsel for Defendant
Defendant

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 06-15538-GG

Feb. 25, 2008

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MICHAEL A. ROSIN,

Defendant-Appellant.

On Appeal from the United States District Court for the Middle District of Florida

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BEFORE: BLACK, HULL and FAY, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by Appellant is DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
UNITED STATES CIRCUIT JUDGE

---

18 U.S.C. § 3553. Imposition of a sentence

(a) Factors to be considered in imposing a sentence. The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider –

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed –

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for –

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines –

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g) [18 USCS § 3742(g)], are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement –

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g) [18 USCS § 3742(g)], is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

(b) Application of guidelines in imposing a sentence.

(1) In general **[Caution: In United States v. Booker (2005) 543 US 220, 160 L Ed 2d 621, 125 S Ct 738, the Supreme Court held that 18 USCS § 3553(b)(1), which makes the Federal Sentencing Guidelines mandatory, is incompatible with the requirements of the Sixth Amendment and therefore must be severed and excised from the Sentencing Reform Act of 1984.]**. Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the

court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

(2) Child crimes and sexual offenses.

[(A)] Sentencing. In sentencing a defendant convicted of an offense under section 1201 [18 USCS § 1201] involving a minor victim, an offense under section 1591 [18 USCS § 1591], or an offense under chapter 71, 109A, 110, or 117 [18 USCS §§ 1460 et seq., 2241 et seq., 2251 et seq., or 2421 et seq.], the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless –

(i) the court finds that there exists an aggravating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence greater than that described;

(ii) the court finds that there exists a mitigating circumstance of a kind or to a degree, that –

(I) has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or

policy statements issued under section 994(a) of title 28, taking account of any amendments to such sentencing guidelines or policy statements by Congress;

(II) has not been taken into consideration by the Sentencing Commission in formulating the guidelines; and

(III) should result in a sentence different from that described; or

(iii) the court finds, on motion of the Government, that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense and that this assistance established a mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence lower than that described.

In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission, together with any amendments thereto by act of Congress. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence

imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission, together with any amendments to such guidelines or policy statements by act of Congress.

(c) Statement of reasons for imposing a sentence. The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence –

(1) is of the kind, and within the range, described in subsection (a)(4), and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in the written order of judgment and commitment, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public

record of the court's statement of reasons, together with the order of judgment and commitment, to the Probation System and to the Sentencing Commission,[,] and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

(d) Presentence procedure for an order of notice. Prior to imposing an order of notice pursuant to section 3555 [18 USCS § 3555], the court shall give notice to the defendant and the Government that it is considering imposing such an order. Upon motion of the defendant or the Government, or on its own motion, the court shall –

(1) permit the defendant and the Government to submit affidavits and written memoranda addressing matters relevant to the imposition of such an order;

(2) afford counsel an opportunity in open court to address orally the appropriateness of the imposition of such an order; and

(3) include in its statement of reasons pursuant to subsection (c) specific reasons underlying its determinations regarding the nature of such an order.

Upon motion of the defendant or the Government, or on its own motion, the court may in its discretion employ any additional procedures that it concludes will not unduly complicate or prolong the sentencing process.

(e) Limited authority to impose a sentence below a statutory minimum. Upon motion of the Government,

the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

(f) Limitation on applicability of statutory minimums in certain cases. Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846) or section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963), the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that –

(1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act [21 USCS § 848]; and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

18 U.S.C. § 4241. Determination of mental competency to stand trial or to undergo postrelease proceedings

(a) Motion to determine competency of defendant. At any time after the commencement of a prosecution for an offense and prior to the sentencing of the defendant, or at any time after the commencement of probation or supervised release and prior to the completion of the sentence, the defendant or the attorney for the Government may file a motion for a hearing to determine the mental competency of the defendant. The court shall grant the motion, or shall order such a hearing on its own motion, if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense.

(b) Psychiatric or psychological examination and report. Prior to the date of the hearing, the court may order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247(b) and (c) [18 USCS § 4247(b) and (c)].

(c) Hearing. The hearing shall be conducted pursuant to the provisions of section 4247(d) [18 USCS § 4247(d)].

(d) Determination and disposition. If, after the hearing, the court finds by a preponderance of the

evidence that the defendant is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense, the court shall commit the defendant to the custody of the Attorney General. The Attorney General shall hospitalize the defendant for treatment in a suitable facility –

(1) for such a reasonable period of time, not to exceed four months, as is necessary to determine whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the proceedings to go forward; and

(2) for an additional reasonable period of time until –

(A) his mental condition is so improved that trial may proceed, if the court finds that there is a substantial probability that within such additional period of time he will attain the capacity to permit the proceedings to go forward; or

(B) the pending charges against him are disposed of according to law; whichever is earlier.

If, at the end of the time period specified, it is determined that the defendant's mental condition has not so improved as to permit the proceedings to go forward, the defendant is subject to the provisions of sections 4246 and 4248 [18 USCS §§ 4246 and 4248].

(e) Discharge. When the director of the facility in which a defendant is hospitalized pursuant to subsection (d) determines that the defendant has recovered to such an extent that he is able to understand the nature and consequences of the proceedings against him and to assist properly in his defense, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the defendant's counsel and to the attorney for the Government. The court shall hold a hearing, conducted pursuant to the provisions of section 4247(d) [18 USCS § 4247(d)], to determine the competency of the defendant. If, after the hearing, the court finds by a preponderance of the evidence that the defendant has recovered to such an extent that he is able to understand the nature and consequences of the proceedings against him and to assist properly in his defense, the court shall order his immediate discharge from the facility in which he is hospitalized and shall set the date for trial or other proceedings. Upon discharge, the defendant is subject to the provisions of chapters 207 and 227 [18 USCS §§ 3141 et seq. and 3551 et seq.].

(f) Admissibility of finding of competency. A finding by the court that the defendant is mentally competent to stand trial shall not prejudice the defendant in raising the issue of his insanity as a defense to the offense charged, and shall not be admissible as evidence in a trial for the offense charged.

UNITED STATES DISTRICT COURT MIDDLE DISTRICT OF FLORIDA TAMPA DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

VS.

MICHAEL A. ROSIN,

Defendant.
/

CASE NO: 8:05-CR-143-T-24MAP

Tampa, Florida
March 1, 2006
9:00 a.m.

VOLUME 17
TRANSCRIPT OF JURY TRIAL PROCEEDINGS BEFORE THE HONORABLE WILLIAM J. CASTAGNA UNITED STATES DISTRICT JUDGE

APPEARANCES:

Counsel for Plaintiff:

MS. KATHERINE M. HO
U. S. Attorney's Office
501 W. Church Street
Suite 300
Orlando, Florida 32805
407-648-7539

ROBERT MONK, ESQUIRE
U. S. Attorney's Office
400 North Tampa Street
Suite 3200
Tampa, Florida 33602
813-274-6000

Counsel for Defendant: GREGORY W. KEHOE, ESQUIRE
James, Hoyer, Newcomer & Smiljanich
One Urban Centre, Suite 550
4830 W. Kennedy Boulevard
Tampa, Florida 33607
813-286-4100

* * *

[133] never -- the Defendant never found multiple spots on his body during any one visit.

In assessing the lab technicians' credibility, I also ask you, ladies and gentlemen, to keep in mind they don't know each other. Each one was asked, do you know all these other people, and there were a few -- they had that meeting where Sandra and Dusty and Julia and Carolyn were. But, for the most part, these lab technicians do not know each other and did not sit around a room and come up with a story to come in here and tell you.

Members of the jury, this case involves sometimes detailed evidence and testimony. But, in the sense of fulfilling your responsibilities as jurors, the evidence in this case has presented two starkly different and irreconcilable pictures of this Defendant. He is either a caring, dedicated physician whose only concern is a devoted interest in the welfare of his patients; or he is a greedy, dishonest individual who is guilty as charged of the offenses in the Superseding Indictment.

I understand that it is difficult to believe that a physician, that a medical doctor, would do the things that this Defendant is accused of in the Superseding Indictment, but there are in this world, ladies and gentlemen, doctors who lie and who steal, just [134] as there are lawyers who lie and who steal, just as there are bankers who lie and who steal. There are people in this world who lie and who steal.

The first and the most sacred duty of a medical doctor, members of the jury, is to first do no harm. And this physician was motivated by the same thing that motivates everyone who lies and who steals. The details of their conduct may differ, but it can be explained quite simply and in one word, greed.

The Defendant violated that sacred duty to first do no harm to his patients. It is now your duty to hold him accountable according to the law. I ask you to do that. The evidence has shown beyond a reasonable doubt that the Defendant is guilty of all 70 counts of the Superseding Indictment. All that remains is for you to say so. I ask you to return a verdict of guilty on all 70 counts of the Superseding Indictment.

And finally, on behalf of the United States and the entire prosecution team, I thank you very much for your time and for your attention during this last month.

MR. KEHOE: Excuse me, Judge. If I may go to sidebar briefly?

THE COURT: Yes, you may.

(Thereupon, the following sidebar conference was had:)

* * *